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**The Lost Earning Capacity of Child Sexual Abuse
Survivors: Strategizing for Effective Compensatory Avenues**

by

Christine Forster

A thesis submitted to
the Faculty of Graduate Studies and Research
in partial fulfillment of
the requirements for the degree of

Master of Arts

Department of Law

Carleton University

Ottawa, Ontario

12 January, 1996

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**The Lost Earning Capacity of Child Sexual Abuse Survivors: Strategizing for
Effective Compensatory Avenues**

submitted by Christine Forster, B.A. (Massey) LL.B. (Otago, New Zealand)

**in partial fulfilment of the requirements for
the degree of Master of Arts**

Thesis Supervisor

Chair, Department of Law

**Carleton University
January 19, 1996**

ABSTRACT

This thesis focuses on civil suits pursued by child sexual abuse survivors for earnings related compensation, as one response to a growing public awareness of sexual abuse in Canada. It explores conceptual devices, historically-replicated within the framework of tort law, which have created doctrinal structures which operate to marginalize women's injuries. The developments identified in the tort law context are then situated in a broader social context with an exploration of the impact of dominant familial ideologies on the claims of survivors. It concludes that litigation for loss of earnings is inherently limited by the construction of conceptual structures and the interplay of such ideologies, which together operate to regulate women's access to financial resources. As such the patterns identified both within and beyond the structure of tort law contribute to the maintenance and replication of patriarchal relations.

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CHAPTER ONE

INTRODUCTION

Background

In this thesis I analyze the reluctance of judges to award loss of earnings compensation to survivors of child sexual abuse in tort-based claims. This involves examining the conceptual structures at work within tort law itself and exploring the litigation in relation to broader social and ideological frameworks within which the cases are taking place.

Over the past two decades there has been a growing public concern in Canada about the incidence of child sexual abuse. This concern was sparked, in part, by a number of studies on sexual abuse in several Commonwealth countries and in the United States. A growing international focus on the rights of children,¹ and persistent and vocal demands by feminists for social reforms to address gender specific harms against women in the family context also contributed.

The concerns were augmented and highlighted by a series of highly publicized "exposures" of child sexual abuse as

¹ The United Nations Convention on the Rights of the Child was signed by Canada in May, 1990. See Alison Young, "Child Sexual Abuse and the Law of Evidence: Some Current Canadian Issues" (1992-93) 11 Canadian Journal of Family Law 1.

survivors began to come forward in unprecedented numbers to seek redress. In Newfoundland, a number of adult men came forward with descriptions of horrific abuse perpetrated on them by Lay Brothers when they were residing in the Roman Catholic Mount Cashel orphanage.² In Prescott, a small town in Eastern Ontario, police investigated widespread inter-generational sexual abuse and incest, after rumours were leaked to the media.³ In 1991, it was revealed that scores of girls were abused by guards at Grandview Training School for Girls in Cambridge, Ontario, from the late 1960's to the mid-1970's.⁴ In Martensville, a small town in Saskatchewan, nine people were charged with sexually abusing 30 local children at a child care centre.⁵ More recently Aboriginal women have come forward with accounts of sexual abuse both in the residential schools they were forced to attend when they were children and

² See e.g., Michael Harris, Unholy Orders. Tragedy at Mount Cashel (Toronto: Penguin Books, 1990). A Royal Commission into the Mount Cashel Affair was conducted by Justice Samuel Hughes and released on May 31, 1991. There have since been a number of criminal convictions.

³ See e.g., "Rumour and Scandal" MacLean's, March 26 1990, at 55-56. More than 30 people have been charged since the investigation began.

⁴ See e.g., "Grandview Survivors Hold Rally" Toronto Star, January 30 1994, at A10; "Ex Guard Faces 56 Charges in Sex Case" March 17 1994, at A8; "Former Grandview Wards Get Compensation Deal" Globe and Mail, July 1 1994, at A15.

⁵ See e.g., "The Agony of Martensville" MacLean's, June 15 1992, at 20; "The Martensville Scandal" MacLean's, June 22 1992, at 24-30.

in their own communities.⁶ Likewise, a 1989 report based on research conducted on reserves in Northern Ontario, revealed a staggering 8 in 10 Aboriginal women in that region had been abused at some point in their lives.⁷ The subsequent media attention to such incidents sparked a nationwide awareness of the pervasive reality of child sexual abuse.

A range of regulatory legal and social responses were initiated including Royal Commissions, criminal prosecutions, compensatory agreements and a surge of private litigation. Government responses included the establishment of the Badgley Committee in 1980 "to enquire into the incidence and prevalence in Canada of sexual offenses against children and to recommend improvements in the law for the protection of young persons from sexual abuse and exploitation."⁸ The Badgley Report,⁹ completed in 1984, found that child sexual abuse was a pervasive and frequent occurrence in Canadian

⁶ Criminal action is currently proceeding in respect of one such residential school: R. v. O'Connor (1994), 90 C.C.C. (3d) 257. See also Ashley Wright, "Forbidden Voices. Native Family Violence on a Northern Ontario Reserve" Eye Opener, July 1990, at 54. Also "The End of Silence. Exposing Sexual Abuse of Native Children" MacLean's, September 14 1992, at 14-16.

⁷ Ontario Native Women's Association, Breaking Free: A Proposal For Change to Aboriginal Family Violence (Thunder Bay: 1989).

⁸ Report of the Committee on Sexual Offenses Against Children and Youths, Sexual Offenses Against Children by Robin Badgley et al., vol.1 (Ottawa: Canadian Publishing Centre, August 1984) at 1.

⁹ Ibid.

society and confirmed previous research and testimonies of experts working in the field. The research conducted by the Committee found the effects of child sexual abuse to be extensive and often devastating. More specifically, the Report found that one in two female children and one in three male children were victims of unwanted sexual acts,¹⁰ and that 98 per cent of the assailants were men.¹¹

The Badgley Report recommended a number of substantive and procedural reforms to the federal criminal law with the aim of providing better protection to young persons from sexual abuse. As a result, the Criminal Code was amended in 1987¹² to include a wider range of offences beyond that of sexual intercourse with a child. It also became an offence to incite, counsel or invite a person under 14 years of age to partake in any of the activities now deemed offences in the amended Code.¹³ Bill C-15¹⁴ introduced new procedural evidential requirements whereby children could give evidence from behind a screen or via a closed circuit television. Most provincial jurisdictions also introduced mandatory reporting of suspected child sexual abuse for particular groups of

¹⁰ Ibid. at 193.

¹¹ Ibid. at 215.

¹² "An Act to Amend the Criminal Code and the Canada Evidence Act", S.C. 1987, c.24; now R.S.C. 1985, c.19 (3rd Supp.).

¹³ Ibid. s.151 & s.152.

¹⁴ Ibid. S.C. 1987, c.24.

professional persons.

Of all of these reforms, however, none was directed to facilitate compensation for survivors of child sexual abuse. Compensation provides an essential accompaniment to criminal action, enabling survivors to recoup their lives after the devastating injuries that many suffer. There are three well recognized formal avenues for survivors to obtain compensation in Canada. Each one is problematic and beset with limitations. Restitution, rarely used,¹⁵ is a monetary sum awarded at the time of sentencing but payable by the defendant to the plaintiff rather than as a fine to the state. Criminal Injuries Compensation schemes operate in each province to compensate victims of criminal injuries out of a central fund. Generally, the schemes have low rates of compensation and are plagued by administrative problems and inconsistencies.¹⁶ The final avenue, which is the focus of my research, is the civil action for damages in the civil courts, usually in the torts of assault and battery.¹⁷

¹⁵ See Elizabeth Sheehy, "Compensation for Women Who Have Been Raped" in Julian Roberts & Renate Mohr eds., Sexual Assault. A Decade of Legal and Social Change (Toronto: Toronto Press, 1994) at 208.

¹⁶ Ibid. at 211.

¹⁷ More recently other alternatives have been pursued. For example, a compensation package was negotiated with the Ontario government by lawyers representing over 200 women survivors who were abused by guards at the Grandview Training School. The package offers a number of attractive components: a pain and suffering award of between \$3,000 and \$60,000, tuition fees for retraining, all costs for future counselling, and finally a guarantee that the settlement will not affect

Historically, the option of the civil action was not often pursued by survivors of child sexual abuse. Between 1900 and 1984 only a handful of tort cases for sexual assault and battery were reported.¹⁸ However, since 1984 there has been a surge of actions in the civil court. Over 50 cases for sexual assault and battery have been brought, of which 31 involved instances of child sexual abuse.

Little research has been done to explore why sexual abuse survivors in Canada have chosen to pursue civil litigation in

welfare payments. The package has a number of advantages. For example, women do not have to proceed through gruelling civil suits, and the unlimited settlement amount for retraining and counselling is significant. (This information came from Susan Vella, one of the lawyers representing the plaintiffs.)

The settlement is reasonable in the context of past awards for survivors of sexual assault. However it is unreasonable in the context of awards for other similarly devastating injuries. It does not therefore address the significant declassification of gender specific sexual injury in the civil courts. Moreover, such a settlement may only be available in claims against institutions which wish to keep out of the courts and can afford to do so.

Similarly, in Nova Scotia an investigation is currently being held into sexual abuse at five residential schools. Starting with the Kingsclear Residential School, an investigative team is implementing an alternative dispute resolution process to determine appropriate levels of compensation for survivors. It remains to be seen whether such avenues will offer a better compensatory route for survivors than the formal court process. See generally Donalee Moulton, "Nova Scotia Considering Alternative Dispute Resolution Process for Inquiry into Sex Abuse Case" The Lawyers Weekly, January 27, 1995, Doc. 6038.

¹⁸ See Sharon Batt, "Our Civil Courts. Unused Classrooms for Education About Rape" in Feminism Applied: Four Papers (Ottawa: Bradda Printing Services Inc., 1984) at 63, who found reference to eight reported cases during this period.

recent years.¹⁹ It is, however, part of a nationwide trend whereby numerous survivors are coming forward in differing contexts to seek redress for their injuries, in both the criminal courts and civil courts. Many social, economic, and legal barriers come between survivors and compensation,²⁰ but

¹⁹ Bruce Feldthusen argues in "Therapeutic Jurisprudence" (1993), 25 Ottawa Law Review 206 that women have been motivated to sue by the therapeutic benefits of such action. He argues that the process of confronting their abusers in court, and the knowledge that they are encouraging other survivors to act likewise, aids their healing. Although not the subject of my research I question an argument that promotes the view that women are primarily motivated to sue by altruistic reasons. Although clearly the issues are not solely monetary, I suggest that the prominence of media attention to the issue has created an information pool which has alerted women to the financial remuneration to which they are entitled. In New Zealand, for example, feminist lawyers and groups networked extensively to distribute information to the public regarding the potential eligibility of survivors of sexual abuse to receive lump sum compensation under the Accident Compensation Acts, of 1972 and 1982. The result was an unprecedented flood of claims. As such claims required neither the participation of the offender nor a criminal conviction, and the process proceeded in confidentiality, the claimants were clearly not motivated for the reasons put forward by Feldthusen. Instead, it seems more likely that financial remuneration was a primary motivating factor. See generally Robin McKenzie, "Lump Sums of Litigation? Compensation for Sexual Abuse. The Case For Reinstatement of a Compensation For Criminal Injuries Scheme" (1993) 15 New Zealand Universities Law Review 367.

²⁰ See Elizabeth Sheehy, supra note 15 at 205, who provides an overview of social, economic and legal barriers facing survivors of sexual assault when they consider pursuing a civil suit. Also see Janet Posher, "Challenging Limitation Periods. Civil Claims By Adult Survivors of Incest" (1994) 44 University of Toronto Law Journal 169, who examines the impact of the Limitations Act on such claims; and Nora West, "Rape and The Victims Tort Alternative" (1992) 50 University of Toronto Faculty of Law Review 96-118 who discusses a range of the social, legal and economic barriers which hinder survivors of rape who seek compensation in the civil courts for their injuries.

the persistence of such actions seems to have facilitated an erosion of some of these barriers²¹ and to have created new avenues for redress. For instance, the factual situations giving rise to potential liability have been extended to include breach of fiduciary duty between parent and child,²² doctor and patient,²³ and police and the public.²⁴ In a recent decision in British Columbia, the Vancouver Children's Foundation was found vicariously liable for an employee's

²¹ The most explicit legal barrier to claims is the Limitations Act which limits action for assault and battery to four years after the injury, and to six years for negligence. It was successfully challenged in 1992 and an exception established: K.M. v. H.M., [1992] 3 S.C.R. 6. The doctrine of "discoverability" delays the commencement of the limitation period until all the elements of a cause of action have been "discovered" by the plaintiff. This means the limitation period does not begin to run until the survivor is aware that the assaults occurred, that the assaults were wrong, and that the effects she suffered were a result of the assault. The prevalence of repressed memory, whereby survivors "block out" memories of the abuse, and a consistent lack of awareness by survivors that the difficulties they face are attributable to the sexual abuse means the claims of many survivors come within the framework of the exception. See further Judith Herman, Trauma and Recovery (New York: Basic Books, 1992) at 123, who discusses how survivors characteristically do not connect their suffering to the abuse.

²² In K.M. v. H.M., [1992] 3 S.C.R. 6. it was held that incest was a breach of fiduciary duty between parent and child. In J. (L.A.) v. J. (H.) and J. (J.) (1993), 13 O.R. (3d) 306 (Ont.Gen.Div.) it was held that a mother who knew of the abuse had a fiduciary duty to protect her child from the perpetrator.

²³ See Norberg v. Wynrib, [1992] 2 S.C.R. 226.

²⁴ See Jane Doe v. Board of Commissioners of Police for the Municipality of Metropolitan Toronto (1990), 72 D.L.R. (4th) 580 (Ont.Gen.Div.)

sexual assaults to a child in the agency's care.²⁵ In another, a Roman Catholic Diocese was found liable for the actions of a priest who sexually assaulted a teenage boy he was supposed to be counselling.²⁶

The erosion of barriers and the opening of new avenues for compensation seem to have resulted in more actions being brought with a higher success rate. Indeed, in all but two of the civil actions pursued by child sexual abuse survivors in the last decade, there has been a finding that the abuse occurred. Subsequently, judges have recognized the effects of the abuse as injuries which fall within the framework of tort law and have awarded damages. In this context, a new significance is placed on the amount of any such award and on the process by which a judge calculates that amount.

Prior to 1978 the process of damage assessment in instances of personal injury was in a state of confusion. I discuss this situation in Chapter three but, in brief overview, judges followed a variety of approaches to the assessment of non-pecuniary damages.²⁷ The application of the

²⁵ B. v. Curry, [1995] B.C.J. No.1468 (QL).

²⁶ T. v. Poirier, [1994] O.J. No.1046 (QL).

²⁷ Non-pecuniary damages refer to "intangible" injuries, such as emotional distress, which are considered not to be easily ascertained. This commonly includes pain and suffering, loss of amenities, and loss of enjoyment of life.

principle of restitutio in integrum²⁸ to such awards was considered problematic because of the intangible nature of the injuries and the impossibility of returning the plaintiff to her or his pre-accident position. With regard to pecuniary damages,²⁹ many judges did not itemize the factors which they considered in their assessment and simply made global awards. This made it difficult to reconsider the award on appeal and did not provide any guiding principles for later cases. In 1978, in an attempt to eliminate uncertainty and to systematize and rationalize this area of the law, the judges of the Supreme Court of Canada outlined, in a "trilogy" of cases, a new and comprehensive approach to the assessment of damage awards in instances of personal injury.³⁰ In particular, the judges focused on the application and underlying principles of non-pecuniary and pecuniary damages.

In respect of pecuniary damages for future loss of earnings and future care they outlined an itemized approach to assessment, listing in detail the factors to be considered. They also clarified the approach to be taken when assessing

²⁸ According to this principle, which underlies much of tort law, injured persons should be put back to their pre-accident position.

²⁹ Pecuniary damages refer to "tangible" injuries which can be easily ascertained. They commonly include past and future loss of earnings, the cost of future care and any other particular and definitive costs which result from the injury.

³⁰ The so-called "trilogy" of cases included Andrews v. Grand & Toy Alta. Ltd., [1978] 1 W.W.R. 577; Arnold v. Teno (1978), 83 D.L.R. (3d) 609.; Thornton v. S.District No.57 Board of Trustees (1978), 83 D.L.R. (3d) 480 (S.C.C.).

such awards, confirming that full compensation, putting the victim back into her or his pre-accident economic position, was the primary underlying aim. The loss of earnings award continued, as it always had, to have an unlimited quantum providing the major component to most personal injury awards.

By contrast, the rationale for non-pecuniary damages for pain and suffering, was restated by Dickson J. as being directed to providing "fair and reasonable"³¹ compensation. He reasoned that the bulk of the effects of an injury would be compensated within the pecuniary award, and that the non-pecuniary award for pain and suffering was merely an additional amount to relieve suffering. As such, Dickson J. placed an inflation-adjusted cap of \$100,000 on awards.³² The intent was that the two types of awards would provide, in tandem, full compensation and address all aspects of any injury. The Canadian jurisdiction has since been considered to have the most "advanced" assessment procedure in the Commonwealth.

While laudable as an attempt to clarify a confused area of tort law, the "trilogy" has also had an impact on damage awards that has been less desirable. Extensive doctrinal research has revealed that systemic gender bias operates in the application of the principles laid down in the trilogy as it applies to the assessment of future loss of earnings awards

³¹ Andrews, ibid. at 255.

³² Ibid. at 256.

in general instances of personal injury. For example, in assessing the award judges rely on actuarial tables which are based on the average wages of men and women over the past 50 years. This has the effect of reproducing wage differentials in the labour market. If a female child suffers a debilitating injury she will receive a much smaller award than a male child who suffers similar injuries.³³ A series of adjustments, called contingencies, operate to reduce awards on the basis of possible future events which can be foreseen as interfering with the claimants capacity to earn. These assessments result in a series of award reductions for women based on traditional assumptions about their roles and family responsibilities. For example, reductions flow from the possibility that they might marry and become financially dependant on a male, or the possibility that they will leave the workforce at some time to raise children.³⁴

However, such biases are not the primary feature of the child sexual abuse cases. Rather, damage awards are mostly

³³ See Elaine Gibson, "Loss of Earning Capacity for the Female Tort Victim: Comment on Tongeguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital (1992) 17 C.C.L.T (2d) 78 [hereinafter "Loss of Earning Capacity"]". Also Jamie Cassels, "Damages for Lost Earning Capacity: Women and Children Last" (1993) 71 Canadian Bar Review at 450. Also Elaine Gibson, "The Gendered Wage Dilemma in Personal Injuries Damages" in Ken Cooper-Stephenson & Elaine Gibson eds., Tort Theory (Toronto: Captus University Press, 1993). See also Denise Reaume, "Rethinking Personal Injury Damages. Compensation for Lost Earning Capacity" (1988) 71 Canadian Bar Review 82.

³⁴ Ibid. Cassells at 453-460; Gibson, "Loss of Earning Capacity" at 96-100.

confined to non-pecuniary damages for pain and suffering. Loss of earnings awards are rarely made. When pecuniary awards have been made for lost earnings, the amount, usually low (except in two cases where the plaintiffs were male) appears to have been randomly awarded. Indeed, in instances of child sexual abuse judges have rarely applied the "innovative" principles of damage assessment laid down in the trilogy either to pain and suffering awards³⁵ or to loss of earnings awards.³⁶

The award for loss of future earnings, despite the apparent reluctance of judges to award it, nevertheless appears to have the potential to provide significant remuneration or "real compensation" to a considerable number of survivors (assuming that the damages are paid at all by defendants). In contrast to the pain and suffering award there is no limit to the amount of compensation which may be awarded. There appears to be a persuasive and obvious correlation between many of the typical long-term effects of child sexual abuse and the kinds of skills which are necessary to engage effectively in the marketplace. In particular, the young age at which the abuse typically begins and continues often straddles important formative years for education and the development of the kinds of personal attributes valued in

³⁵ See Kate Sutherland, "Measuring Pain: Quantifying Damages In Civil Suits For Sexual Assault" in Tort Theory, supra note 33 at 213.

³⁶ See Bruce Feldthusen, "Discriminatory Damage Quantification in Civil Actions For Sexual Battery" (1994) 44 University of Toronto Law Journal 135 at 137.

the workplace. It is hardly surprising, therefore, that the vast majority of child sexual abuse survivors are severely dysfunctional in many respects. This is particularly the case in the context of gaining and sustaining paid employment in the "public" sphere. There is much to be compared, then, between child sexual abuse victims, and child victims of other debilitating injuries.

Statement of Thesis.

My research focus stems from the broad spectrum of the compensatory potential of legal or quasi-legal avenues for survivors of child sexual abuse. Although other options are emerging, the tort system currently remains the primary vehicle for compensating personal injuries in Canada. I focus therefore on private litigation. Many aspects of such civil action raise questions and issues for discussion and research. Even the efficacy and appropriateness of the civil suit in meeting the needs of survivors of child sexual abuse remains an undetermined issue to date. However, I concentrate on earnings related compensation and proceed on the assumption that financial compensation is a worthy goal for a significant number of survivors.

My research focuses on the reluctance of judges to award loss of earnings to survivors of child sexual abuse in the Canadian context. I begin by exploring conceptual structures

within the law of tort and argue that a historically-replicated process has occurred wherein the legal concept of harm was conceptually divided into categories of emotional and physical. I argue that, although harm emerged as a single concept in the feudal era, the tentative inclusion of women into the framework of tort law in the mid-nineteenth century, facilitated the division of harm into separate categories of emotional and physical. Women's injuries were associated with emotional harm, and conversely emotional harm was associated with women's injuries. At the same time, emotional harm became less compensatable until, in the current era, it is relegated to a less compensatable class of damages: non-pecuniary. Sexual injury, likewise, is classified as non-physical, the effects of which are emotional and compensated primarily within non-pecuniary damages for pain and suffering.

The second part of my research considers the relationship of the developments within the narrow doctrinal context of tort law to the broader social context of which it is part. My conjecture is that claims for loss of earnings awards as administered through the formal court system, are inherently limited by ideological forces which operate within and beyond the legal framework. These forces place the claims of many survivors on a collision course with dominant ideologies at play in the cases. It is my proposition that modern Anglo-Canadian law, which developed around "public" market society, has not been and is not, primarily concerned with relational

abuses within families. Rather, the importance of the nuclear family unit as a stable private institution directs legal interventions designed to maintain and protect that family form. Loss of earnings claims by child sexual abuse survivors challenge a main tenet of that family form - the economic dependence of women - and, unsurprisingly, invoke ambivalence from judges. They do not recognize the considerable loss to women's capacity to earn caused by child sexual abuse, particularly in terms of lost educational opportunity.

By confining compensation to the head of damages for pain and suffering, women survivors are being compensated for the "emotional" harm they have suffered. At the same time, the perpetrator is punished for his role in the disruption of the ideologically formed nuclear family paradigm. The classification of the harm as emotional, and the subsequent categorization of the ensuing compensation as non-pecuniary, does not involve any challenge to the underlying premises of the nuclear family unit. Non-pecuniary damage awards do not require a conceptualization of women as economically independent. Likewise, pecuniary damages awarded to males that meet the standard of middle-class masculinity support the notion of the nuclear family unit and their role within that context as breadwinner and as an economically independent person.

My research has implications beyond its specific scope. It identifies patterns of gender discrimination rooted in

ideologies which exist beyond the framework of doctrinal law. As such it contributes to a growing body of feminist literature which explores the role of law, as an integral part of society, in replicating and constituting patriarchal relations.

Previous Research.

Over the past decade, as claims for compensation by survivors of child sexual abuse have reached the civil courts, a growing body of feminist literature has emerged addressing the issues that have arisen. More recently, as barriers to such claims have begun to erode, it might be expected that new research would have emerged focusing on the processes of damage assessment. Surprisingly however, only two articles and two case notes have so far appeared in the Canadian legal literature specifically addressing the issue of damage assessment in instances of sexual assault. Nothing focuses specifically on child sexual abuse. All articles to date approach the issue from a doctrinal perspective positing law reform as the solution to the bias discovered by the authors.

For example, Sutherland³⁷ focuses on non-pecuniary compensation for pain and suffering. She argues that judges

³⁷ Supra note 35.

have focused on the conduct of the defendant rather than the harm suffered by the plaintiff and have not followed the applicable principles of damage assessment as laid down in the trilogy. She suggests that judges should focus their analysis on empathy and solace for the victim when assessing the damages award, by using the plaintiff's own description of her experiences as a starting point and guide to assessment.

Feldthusen,³⁸ the only author to examine loss of earnings awards in instances of sexual assault, writes an interesting but tentative account of doctrinal developments in the assessment of such awards. He suggests, in contrast to Sutherland, that the emphasis on solace by judges restricts the loss of earnings award by creating a classification of women's harms as being emotional and too remote from the "real" world of work. His work is preliminary but identifies directions for future research which incorporates a more thorough analysis of the case law in this area with the broader social and legal context of which it is part.

In sum, there has been a marked lack of research on damage assessment in instances of child sexual abuse. That which has been conducted is primarily within a doctrinal framework. I consider that a broader understanding of the factors which may be influencing the process of damage assessment in claims for future loss of earnings is crucial to enable more informed assessment of developments and to

³⁸ Supra note 36.

strategize for compensatory options for sexual abuse survivors.

Sources of Data

There are three primary data sources in my research. First, I have accessed and analyzed a selection of historical cases to explore and identify conceptual clues to current structures and doctrinal assumptions within the framework of tort law. These cases focus on actions which were pursued in the torts of consortium, nervous shock injuries, seduction, and criminal conversation. A comparison between the examples of nervous shock and consortium, where women pursued actions, and seduction and criminal conversation, actions available only to men, reveals differing developments in the conceptualization of harm.

The current data set is comprised of all the child sexual abuse cases available in Canada, including both reported and unreported judgements available on the Quicklaw data base.

A third data source was lawyers. I wrote to, and then later contacted by telephone, a selection of lawyers who represented plaintiffs in child sexual abuse actions where there did not appear to have been a submission for loss of earnings. I asked them why such a submission had not been made, what they considered to be the issues involved in making such a claim, and what their views were on the appropriateness

of such claims. (See also, Appendix A).

Organisation of Thesis

In chapter two, I present a brief overview of each of the child sexual abuse cases, which form the basis of my research. I detail their outcomes and provide a general context to the ensuing analysis of the reluctance of judges to award earnings related compensation to survivors of child sexual abuse.

In chapter three, I explore historical threads in the law of tort and trace the process by which harm emerged as a single concept but was later conceptually divided into separate categories of emotional and physical harm at the juncture at which women sought to be included within its framework.

In chapter four, I examine the law of damages and the development of a distinct division between pecuniary and non-pecuniary damages. I explore how the trilogy reinforced the division between these two categories of damages and at the same time reinforced the division between physical and emotional harm. I argue that the injuries suffered by survivors of child sexual abuse have been classified as emotional and relegated to the non-pecuniary head of damages which is limited by the cap placed upon it by the trilogy. A conceptual barrier, historically constructed, prevents the conceptualization of survivors injuries as material, physical

and pecuniary.

In chapter five, I explore the context of litigation in relation to the social and ideological framework in which the current cases are taking place. I argue that dominant ideologies surrounding the family and the public/private split have created a conceptual barrier between claimants who do not fit a particular model of plaintiff and the "public" market-based location of their claim. I suggest that the perpetuation of the nuclear family form, and women's economic dependence in that context, places the "public" earnings related claims of survivors in conflict with dominant ideology in the cases.

In chapter six, the conclusion, I summarise my findings. I conclude that claims for lost earning capacity are inherently limited for most survivors of sexual abuse. Only those plaintiffs that fit a prescribed model - male, middle-class, heterosexual, abused at an older age, suffering less severe effects and functional in the "public" realm - are likely to successfully pursue claims for loss of earnings. I conclude by exploring the implications of my research and posit some of the numerous questions which arise for future investigation.

CHAPTER TWO

DESCRIPTION OF THE CHILD SEXUAL ABUSE CASES:

SETTING THE SCENE

In this chapter I present a brief description of the 31 recent child sexual abuse cases which form the primary focus of my research. Each case involves the sexual abuse of a child under the age of 16, except for one case which involved a 17 year-old school boy. I give a brief synopsis of the facts, detail the age range of the plaintiff during which the abuse began and continued, outline the current situation of the plaintiff with a particular emphasis on marital status, children and paid employment, and finally provide an overview of the claims submitted and their outcomes.

The cases fall into three groups: the first are those cases where future loss of earnings was claimed and awarded. The second are those cases where a claim was lodged for future loss of earnings but no award was made. This includes a subcategory of cases where, although a claim for future loss of earnings was denied, an award was made for past loss of earnings. This group also includes one case where an educational upgrade was awarded instead of an award for past or future loss of earnings. The final group includes those cases where no claim and no award for future loss of earnings was made.

GROUP I. FUTURE LOSS OF EARNINGS AWARDED

In only five of the 31 cases was an award made for future loss of earnings. These cases included two of the five male plaintiffs and three of the 26 female plaintiffs. The female plaintiffs received awards of \$40,000, \$40,000 and \$15,000. The two male plaintiffs received awards of \$200,000 and \$47,705. All five cases were heard in the British Columbia Supreme Court. The first was in 1991 and the most recent in 1994. The perpetrators included two stepfathers, one uncle, one great-uncle and an employer. In three of these cases, the two involving male plaintiffs and one involving a female plaintiff, an award was also made for past loss of earnings.

The first case is Beaudry v. Hackett¹ in which the plaintiff, now 21, was abused by her stepfather between the ages of six and 13. The abuse began with fondling and progressed to vaginal and anal intercourse, and eventually her brother was also forced to participate. The sexual abuse was often accompanied by beatings with a leather belt. When she was 12, her stepfather forced her to watch pornographic movies and imitate the acts shown in the videos. She suffered from numerous effects including disassociation, anxiety, depression and post traumatic stress disorder. She submitted a claim for past loss of income relying on evidence of her history of employment and an assertion by her doctor that her capacity to

¹ [1991] B.C.J. No.3940 (S.C.) (QL).

work had been affected. She also submitted a claim for future loss of earnings relying on actuarial evidence of the average wages for women who graduate from college. Thackrey J. disregarded this expert evidence and awarded her \$10,000 for past loss of income, and \$40,000 for future loss of income. He reduced both awards on the basis that "she was living with a working mother and, when not working, a mother who apparently amused herself playing bingo. She was living with a man who was working in construction. None of these factors mitigate in favour of the income potential of a child."² She was also awarded \$5,000 for future care, and \$85,000 for pain and suffering and aggravated damages.

The second case, K.G v. J.T.,³ involved frequent abuse of the plaintiff by her father from the age of five to 12. She was subjected to fondling and mutual masturbation and she was forced to watch pornographic videos. Parrett J. did not accept that all the effects described by the plaintiff, including bulimia, substance abuse, attempted suicide, depression, and post traumatic stress disorder, stemmed from the sexual abuse. He suggested instead that her "strained" relationship with her mother may have been a contributing factor. The plaintiff submitted a claim for past and future loss of earnings. To support her claim she submitted evidence of her total pre-trial earnings since leaving school. Overall, this was an

² Ibid. at 13.

³ [1992] B.C.J. No.1365 (S.C.) (QL).

amount of \$59,000. Actuarial evidence showed that the average wage for a female with high school education for that period was \$111,000. She claimed the difference of \$52,000. The judge awarded \$26,000 on the basis that only some of the effects were attributable to the defendant. The plaintiff also claimed for a future loss of earnings on the basis that, but for the abuse, she would have gone to university and earned a doctoral degree. The judge decided that the evidence submitted and the expert opinion were "too speculative and lacked any proper foundation to support such an award."⁴ He was unconvinced that the plaintiff would have obtained a university degree, let alone the post graduate degrees suggested. He awarded her \$15,000 for future loss of income, \$45,000 for pain and suffering, \$5,000 punitive damages, and \$24,000 for future care.

In P.C.P v. Da Costa,⁵ the male plaintiff, a 17 year-old high school boy at the time of the abuse, was assaulted by his supervisor when doing summer work at a mill. The abuse consisted of the defendant grabbing the plaintiff's genitals through his clothing, sexual innuendos, and the defendant exposing himself. The assaults occurred over a period of one month. As a result, the plaintiff suffered from a peptic ulcer, insomnia, distress, anxiety, post stress traumatic syndrome, all initiated by the sexual abuse and, according to

⁴ Ibid. at 28.

⁵ [1992] B.C.J. No. 2303 (S.C.) (QL).

the psychiatrist, exacerbated by a difficult relationship with his mother. However, the psychiatrist testified that he was mostly recovered, with his maturity and self confidence improved. The plaintiff submitted a claim for a loss of tuition fees for one year, and for future loss of earnings. MacDonald J. accepted that these losses were a direct consequence of the assaults and awarded him the amount of his tuition fees for that year. To support his claim for loss of future earnings he outlined his intention to go to law school once he completed his B.A. He was awarded \$47,875 for future loss of earnings based on a projected late entry to the workforce as a lawyer. He was also awarded \$10,000 for pain and suffering.

The fourth case is Slinn v. Morgan.⁶ In this case the male plaintiff was abused by his uncle between the ages of nine and 14, mostly in the defendant's landrover. The abuse, estimated by the plaintiff at 800 incidents, occurred during weekend and summer visits. The abuse began with fondling and gradually developed to mutual masturbation and fellatio. For a period of time a third boy was drawn into the abuse. The plaintiff was not subject to any non-sexual physical violence, however he was threatened on a number of occasions. The defendant told him his parents knew of the abuse and approved, and on one occasion he threatened him with a gun. The plaintiff graduated from school with average but acceptable

⁶ [1993] B.C.J. No. 315 (S.C.) (QL).

grades, took courses in jewellery design and worked full time until 1985. He took a three year absence from work at that time reporting an inability to leave the house, a fear of Landrovers, a fear of men, and sexual dysfunction. He returned to work in 1988. The plaintiff submitted a claim for past and future loss of earnings. To support his claims, the plaintiff submitted extensive evidence of his working life, and actuarial tables indicating that the future lifetime earnings of a male university graduate would be between \$680,000 and \$1,000,000. The judge accepted there was a past loss of earnings and awarded \$70,000, explaining that his underachievement and lack of success academically and career wise was related to the abuse. The judge also held that the evidence established a high likelihood that the plaintiff would suffer a future loss of income. He was satisfied that the plaintiff had the intention and ability to further his education and achieve his career aspirations and had fallen short of his goal because of the conduct of the defendant. He awarded the plaintiff \$200,000 for future loss of earnings, the largest such award to date in a child sexual abuse case. He was also awarded \$80,000 for pain and suffering.

The most recent case to successfully claim a loss of future earnings was H (S) v. L(R.G).⁷ The plaintiff was abused by her stepfather repeatedly from the age of nine until 12, while her mother was at work in the evenings. The abuse

⁷ [1994] W.W.R. 276. No.B6595 (QL).

included fondling and mutual masturbation. The plaintiff, now single with two children and currently employed part-time in a veterinary clinic, described the effects of the abuse on her life. She detailed her constant depression with several stays in mental institutions, her dislike of intimacy and touching, and an attempted suicide. Preston J. assessed the effects as "devastating" and "crippling her emotionally for the last 30 years and likely to do so for the rest of her life."⁸ The plaintiff submitted a claim for future loss of earnings detailing as evidence a failed desktop publishing business which she had to terminate because of depression. Preston J. commented that "damages are difficult to assess in these cases"⁹ and "one would expect more reliable evidence establishing the causal link between this loss and the acts of the defendant."¹⁰ Despite the "inadequacy"¹¹ of the evidence he awarded \$20,000 for past and future loss of earnings accepting that "it is clear that the effects of the defendants acts have diminished the plaintiffs ability to earn income."¹² She was also awarded a single amount of \$100,000 for general and aggravated damages, \$20,000 punitive damages and \$1,000 for future counselling.

⁸ Ibid. at 11.

⁹ Ibid. at 11.

¹⁰ Ibid. at 15.

¹¹ Ibid.

¹² Ibid.

GROUP 2. FUTURE LOSS OF EARNINGS CONSIDERED BUT NOT AWARDED

In nine cases, a claim for future loss of earnings was submitted and considered but not awarded. These cases included eight female plaintiffs and one male. In four of these cases, all involving female plaintiffs, a claim was successfully lodged for past loss of earnings, which is a component of special damages and must be specifically pleaded and proven. In each successful case the plaintiff had been in paid employment which she or he subsequently left due to depression or other effects which were accepted as directly attributable to the abuse.

The first case is Brandner v. Brandner¹³ where the plaintiff was abused by her father between the age of four and 15. She was subjected to severe abuse including intercourse, oral sex and bestiality with the pet dog and cat. The plaintiff, now 23 and lesbian, described her low self esteem, guilt, shame, anxiety, and lack of trust of those in authority, especially men. Her claim for future loss of earnings was refused. However, she was awarded \$100,000 for pain and suffering and \$50,000 aggravated damages.

In Gray v. Reeves,¹⁴ the plaintiff was abused by her uncle between the ages of four and 12. The abuse involved fondling and digital penetration and occurred primarily when

¹³ (1991) 71 Manitoba Reports (2d) 265.

¹⁴ (1992), 10 C.C.L.T. (2d) 32.

the two families, sharing close familial ties, went on joint holidays or had shared meals. Her parents were informed of the abuse when the defendant was very young, and after warning the defendant they mistakenly assumed the abuse had stopped. The plaintiff, now 30, single, without children and unemployed, described at length the effects of the abuse. She suffered from depression, fatigue, poor self image, distrust of men, obesity, disassociation, sexual dysfunction, inability to form relationships, and lack of trust. The judge considered the assaults to be "not severe."¹⁵ The psychiatrist assessed the effects as less likely to be severe because the perpetrator was her uncle and there was no violence or intercourse. The plaintiff submitted a claim for past and future loss of earnings, but both were dismissed. She was awarded \$45,000 for pain and suffering, \$12,500 punitive damages, \$7,500 for past care and \$20,000 for future care.

In D.C. v. K.C.,¹⁶ the male plaintiff was frequently abused by his father between the age of seven and 15. The abuse began with fondling and developed to oral and anal intercourse and was accompanied by beatings, threats with a knife and being told he was retarded and "nuts". The plaintiff, now 31, single and working seasonally in a local fish factory, suffered a number of effects including depression, loss of self esteem, problems with intimacy and

¹⁵ Ibid. at 82.

¹⁶ [1993] N.J. No.1144 (QL).

relationships. He had a long history of substance abuse and once attempted suicide. The plaintiff submitted a claim for future loss of income submitting evidence of his educational and work history in support. The claim was dismissed on the basis that no future loss of income or employment opportunity had been proven, and that his limited education and employment were not causally related to the abuse. He was awarded \$65,000 for pain and suffering.

In J.M.T v. A.F.D.,¹⁷ the plaintiff was abused by her stepfather when she was between the ages of eight and 11. The abuse included digital penetration, oral sex and intercourse. Her brother was also forced to take part. The plaintiff suffered from low self esteem, problems with intimacy, nightmares, an inability to form close relationships, eating disorders, and depression. The plaintiff, pregnant and married at 17, was on welfare. To support her claim for loss of earnings she described the effect the abuse had on her education. She dropped out of school at nine because of low self-esteem and an inability to concentrate on her schoolwork or to make friends, and because she was constantly in trouble stealing and sexually acting out. At 11, she was taken into Social Welfare care and, by her early teens, she was severely depressed and contemplated suicide. Despite recognising the severity of the effects and the likely longevity of their duration, Matheson J. dismissed her claim for future loss of

¹⁷ [1995] S.J. No.210 (Q.B.) (QL).

earnings stating: "no evidence adduced that the plaintiff incurred any direct pecuniary loss as a result of the sexual assaults even to the extent of the cost to her of higher education."¹⁸ She was awarded \$65,000 for pain and suffering and aggravated damages.

Past Loss of Earnings

In a subcategory of four cases, an award was made for past loss of earnings, although a submission for future loss of earnings was rejected. In one case claims for both past and future loss of earnings were refused but an educational upgrade was awarded instead.

T.K.S. v. E.B.S¹⁹ involved the abuse of the plaintiff, by her adult cousin, between the ages of eight and 11 on at least 17 occasions. The abuse, which occurred at family events and holidays, included vaginal and anal intercourse, oral sex and the forcing of her brother to sodomise her. The plaintiff suppressed all memory of the abuse until triggered in 1986 by the inappropriate behaviour of the defendant, a practising lawyer, towards his own two children. The effects of the abuse were described by the expert psychiatrist as including bulimia, depression, disassociation, sexual dysfunction, anxiety and low self esteem. The plaintiff, now 33 and married

¹⁸ Ibid. at 12.

¹⁹ [1992] B.C.J. No. 2452 (S.C.) (QL).

with two children, submitted a claim for lost earnings for her delayed re-entry into the workforce over a period of 21 months. She explained that she had been working as a research assistant at the University of Victoria School of Nursing but due to the emotional turmoil caused by her gradual recall of the sexual abuse she was unable to return to work. MacDonell J. accepted the amount submitted as her loss over this period without question, stating that it was an appropriate period of time for which to compensate the plaintiff and awarded \$35,325.21. She was also awarded \$50,000 for pain and suffering and \$4,460.38 for future care.

In K v. D.S²⁰ the plaintiff was abused daily by her father between the ages of six and 17. The abuse started with mutual genital touching but by 15, he was subjecting her to intercourse and had organised a series of peep holes to the bathroom and bedroom. He also forced her to have intercourse with her two brothers. As a teenager she suffered from low self esteem, depression, seizures, eating disorders, panic attacks and disassociation, she showered five times a day, was suicidal, had nightmares, and was unable to deal with adults, particularly men. The plaintiff, now 36, married with three children and employed as a respite care worker to a disabled person, described some of the subsequent effects. Although she graduated from school she had deficient spelling and writing ability. Once when she was attending a bookkeeping course

²⁰ [1994] N.J. No. 371 (Q.B.) (QL).

trade school, she had a panic attack because of the close proximity of male strangers and had to drop the course. She submitted a claim for \$5,000 for past loss of wages which was accepted. The judge agreed that "she will never be totally free of the effects of the abuse"²¹ and awarded her \$70,000 for pain and suffering, \$6,750 for future care, and \$2,035 for past counselling.

In B.O v. E.T.,²² the plaintiff was abused between the ages of four and eight by a family friend who frequently cared for her. The defendant began by showing her pornographic photos and fondling her. Soon he was subjecting her to mutual masturbation, fellatio, digital penetration and attempted intercourse. To keep her silent he told her she would become "retarded" like another child in the community, that her parents would get into trouble and that he was showing her what was expected of a young girl as she grew up. The plaintiff, now 37 and married with children, suffered from feelings of guilt, unworthiness, and anxiety, as well as headaches, stomach ulcers, and reactions to the cold as a result of the cold linoleum floor on which much of the abuse occurred. She was promiscuous, unable to make friends and had low self esteem. She was awarded \$600 for past loss of earnings, \$80,000 for pain and suffering and \$10,000 for aggravated damages.

²¹ Ibid. at 14.

²² [1994] Y.J. No 14 (S.C.) (QL).

In C.M.K v. Young,²³ the plaintiff, at nine, was abused by her teacher for approximately 18 months. The incidents occurred 2-3 times a week either in the schoolroom itself or in the office of the defendant, who was also the principal of the school. The abuse began with fondling and progressed to the defendant forcing the plaintiff to masturbate him. The plaintiff's mother was in a mental institution and the defendant often told her that she was "also crazy." He frequently strapped her, once when she refused to masturbate him. During this time her performance at school was poor and the defendant told her not to worry as he would "fix" her report. In the end he failed her and she had to repeat Grade 4. The plaintiff outlined the effects of the abuse which included poor performance at school, guilt, a suicide attempt at 19, hospitalization twice in a mental institution, depression, and low self esteem. Shabbits J. described the effects as "devastating."²⁴ The plaintiff, now 39 and currently working, submitted claims for past and future loss of earnings. She claimed for a loss of income from the job she gave up in 1990 because of depression. Shabbits J. accepted that there was a loss of income but reduced the amount claimed to \$10,000 on the basis of several factors. First, that "it has not been shown that the loss is as great

²³ [1994] B.C.J. No. 2729 (S.C.) (QL).

²⁴ Ibid. at 10.

claims."²⁵ Second, the causal link between this claim and the acts of the defendant was "somewhat nebulous."²⁶ Third, the plaintiff had been abused by other persons which also contributed to her depression. Fourth, precise proof of the amount of damages was not possible. Her claim for future loss of earnings was dismissed on the basis that "she has not established that she has lost capacity to earn income in the future."²⁷ She was awarded \$60,000 for pain and suffering and aggravated damages and \$20,000 punitive damages.

In Colquhoun v. Colquhoun,²⁸ the plaintiff was abused by her father between the ages of 14 and 18. The abuse began when the plaintiff, experiencing difficulties in her relationship with her mother, went to live with her father and his current partner. Both the defendant and the plaintiff were athletes, and they frequently ran and trained together. The abuse began with backrubs after training, at first clothed and then nude and gradually developed to kissing, fondling and genital touching. He watched her shower and told her his sexual fantasies. Sometimes he would be in her bed when she got home. At the same time as the abuse began she started to have frequent migraines and developed bulimia, which, at 29, she still suffered from. In Grade 13 she attempted suicide, and

²⁵ Ibid. at 11.

²⁶ Ibid.

²⁷ Ibid.

²⁸ [1994] O.J. No. 681 (Gen.Div.) (QL).

suffered from low self esteem, nightmares, severe disassociation, multiple personalities, anxiety, and distrust of persons in authority. She submitted a claim of \$107,848 for past loss of earnings supported with Statistics Canada data, and records of her income. She also submitted a claim for tuition fees to enable her to re-educate herself, supported by her school counsellor who said he had expected her to be able to go to university. Despite accepting that the plaintiff had "no career prospects",²⁹ Corbett J. refused the claim for past and future loss of earnings. However, she awarded her \$12,000 to gain further education. She was also awarded \$45,000 for pain and suffering, and another \$7,218 special damages.

GROUP 3. LOSS OF EARNINGS CLAIM NOT SUBMITTED

There were 15 cases where there was no mention in the written judgment of a submission for past and future earnings. However, discussions with representing lawyers revealed that in a number of these cases a formal submission was made but without supporting evidence. Judges often discarded such claims without reference in the written judgement. Of these cases, all but three of the plaintiffs were female.

The first case, J.L.N v. A.M.L.,³⁰ involved the frequent

²⁹ Ibid. at 30.

³⁰ [1989] 1 W.W.R. 438 (Q.B.).

abuse of the plaintiff between the ages of six and 12 by her stepfather. The abuse began with fondling and gradually developed to anal and vaginal intercourse, fellatio and digital penetration. A psychologist described the plaintiff, now 16, as unhappy, withdrawn, nervous, unable to form relationships, and suffering from a deep fear and distrust of men. Her teacher described how the abuse had affected her education. The plaintiff was an average, respectful and cooperative student when she started school. Her performance gradually dropped, however, and she failed Grade 9 and had to repeat the year. The judge accepted the plaintiff had suffered severe trauma and awarded \$65,000 for pain and suffering and aggravated damages.

In L.(J.) v. D.(C.C.),³¹ the male plaintiff was abused at 15 by his drama teacher. The plaintiff, now 22 and single, was interested in performance and wanted to be involved in the productions produced by the defendant. The abuse went on for two years, occurring mostly in the defendant's car and holiday home, and included kissing, fondling and fellatio. A psychiatrist and the plaintiff's family doctor testified in the case. The psychiatrist described the plaintiff as suffering from anxiety, alienation, distrust, self doubt, sexual dysfunction and an inability to concentrate. He diagnosed post traumatic stress syndrome. The family doctor disagreed with that diagnosis and suggested that an inner

³¹ [1988] B.C.J. No. 1350 (S.C.) (QL).

conflict for allowing the relationship to continue was the cause of his difficulties. The judge focused on the family doctor's testimony and decided the boy consented to all incidents but the first. An award of \$5,000 for pain and suffering was made for that incident.

Harder v. Brown³² involved the abuse of the female plaintiff, between the ages of 10 and 17 by a family friend. The abuse occurred in the defendant's workplace when the plaintiff, at age ten, began to do odd jobs for him. The defendant, confined to a wheelchair, abused her in his office. He told her both her sister and her mother were also doing it, and paid her money. The abuse continued on and off over a period of seven years. The plaintiff, now a mother of two, described the effects she suffered including loss of self respect, inability to trust people, particularly men, inability to have relationships, and nightmares. Wood J. awarded her \$40,000 for pain and suffering and \$10,000 punitive damages.

In Jane Doe v. Awasis Agency of Northern Manitoba³³ an Aboriginal girl, who had been fostered at birth to white adoptive parents, was sent back to her birth parents on a reservation at age 13, against her will. She was there for 6 months and during this time was raped numerous times by men on the reserve. After being admitted to hospital with depression

³² [1989] B.C.J. No. 1453 (S.C.) (Q.L.).

³³ (1990), 72 D.L.R. (4th) 738 (Q.B.).

and a number of venereal diseases, she was made a ward of the state and returned to her foster parents where she twice attempted suicide. She was awarded \$75,000 for pain and suffering.

B.(A.) v. J.(L.A)³⁴ involved the abuse of three children by their stepfather over a number of years. All three children, 2 girls and a boy, were subjected to fondling, oral sex, and intercourse. Each child reported severe effects. The oldest girl, now 21, subjected to the longest period of abuse, from age nine to 13, suffered from guilt, fear, depression, sexual dysfunction and difficulty with relationships. Although she began high school with promise, her marks and her interest lapsed and she began to engage in self destructive behaviour including carving words and symbols into her flesh. She was later admitted to a hospital for disturbed adolescents, and never returned to school to complete her education. The second child, a boy, now 17, was subjected to abuse several times a month, between the ages of 10 to 12. He was the least affected of the three plaintiffs and apart from a setback in schooling, and "concerns about his sexuality"³⁵ had regained his self esteem. The third child, a girl, now 16, was abused between the age of seven and nine. She suffered anger, loss of trust, lack of confidence, was depressed and suicidal and suffered a two year setback in schooling. Each plaintiff was awarded

³⁴ [1991] 5 W.W.R. 748 (Q.B.).

³⁵ Ibid. at 12.

\$65,000 for pain and suffering, \$10,000 aggravated damages and \$50,000 punitive damages.

In P.(L.) v. L.(A.)³⁶ the plaintiff was abused by her father between the ages of 10 and 14. The abuse began with fondling and gradually developed to oral sex and intercourse. The abuse included violent beatings with a belt, and she was forced to partake in alcohol consumption. The plaintiff, now 27, single with two children, described the effects as including an inability to maintain relationships, a suicide attempt at 13, substance abuse, low self esteem, and an inability to trust men or persons in authority. Demarats J. accepted "her life was significantly and drastically affected by all that happened to her during her childhood years"³⁷ and awarded a global sum of \$60,000.

In S.M.Q. v. Hodgkins,³⁸ the plaintiff was abused by a family friend between the ages of seven and eight. The plaintiff at nine suffered from anxiety, aggressive behaviour, daydreams and her performance at school deteriorated. Although accepting that there would be long term effects, the judge awarded only \$20,000 for pain and suffering and \$5,000 punitive damages.

In G. v. R.,³⁹ the plaintiff was abused between the ages

³⁶ [1991] O.J. No. 1360 (Gen. Div.) (QL).

³⁷ Ibid. at 4.

³⁸ [1991] B.C.J. No. 66 (Gen.Div.) (QL).

³⁹ [1991] B.C.J. No. 66 (S.C.) (QL).

of three and 11 by her father when she visited him on alternative weekends. The abuse consisted of kissing, fondling and attempted intercourse. The plaintiff, now 14, suffered from nightmares, behavioural problems, tantrums, and extensive difficulty at school. Bouck J. acknowledged that she "may never completely recover"⁴⁰ but awarded only \$35,000 for pain and suffering and \$2,000 for future therapy.

In K.M v. H.M.,⁴¹ the plaintiff was abused by her father between the ages of eight and 16. The abuse began with fondling and quickly developed to intercourse. He rewarded her with pop, chips and money and told her that her mother would commit suicide if she found out. Later he placed responsibility on her for initiating sexual activity instructing her to keep her light on "when she wanted him."⁴² She complied, fearful for the safety of her little sister. The plaintiff, now 39 and married with three children, suffered from numerous effects including disassociation, major depression, guilt and sexual dysfunction. She was withdrawn, suspicious and fearful of strangers and had attempted suicide several times. She performed poorly at school and had since worked in a series of low paying jobs. The judge described the effects as "extremely debilitating"⁴³ but only awarded

⁴⁰ Ibid. at 9.

⁴¹ [1992] S.C.R. 6.

⁴² Ibid. at 29.

⁴³ Ibid.

\$10,000 for pain and suffering and \$40,000 for punitive damages.

In B.(P.) v. B.(W.)⁴⁴ the plaintiff was abused by her father frequently between the ages of five and 18. The abuse began with fondling and progressed to intercourse, mutual oral sex, and sodomy and was accompanied by beatings. The plaintiff, now 23 and attending university, suffered from low self esteem, guilt, and blackouts, had difficulty with relationships, and had attempted suicide twice. Cunningham J. described the case "as the most serious I have ever seen"⁴⁵ and awarded her \$75,000 for pain and suffering, \$50,000 punitive damages, \$50,000 for future care and \$9,037 special damages.

In J.(L.A) v. J.(L.A.)⁴⁶ the plaintiff was abused by her common-law father regularly between the ages of 12 and 18. The abuse started with fondling and progressed to intercourse. He told her it was "natural" and gave her money. The plaintiff, now 20, who had recently dropped out of university, suffered from low self esteem, lack of trust, bulimia and was unable to cope with university study. The plaintiff jointly sued her mother, who knew about the abuse and did not actively attempt to prevent it, as well as her father. The judge awarded her \$29,000 for pain and suffering and \$30,000 for future care to

⁴⁴ [1992] O.J. No. 2538 (Gen. Div.) (QL).

⁴⁵ Ibid. at 16.

⁴⁶ [1993] O.J. No. 266 (Gen. Div.) (QL).

be paid by the defendant stepfather and \$45,000 punitive damages against the mother.

In S.C. v. R.L.L.,⁴⁷ the plaintiff was abused by her grandfather when she was between the ages of five and 11. The abuse occurred when she visited her grandparents in the summer and on weekends and included kissing, mutual masturbation and attempted intercourse. On a few occasions, her grandfather used a broomstick to penetrate her. He threatened to place her in an orphanage if she told, and once used a snake to frighten her. As a result the plaintiff suffered from low self esteem, sexual dysfunction, obesity, two personality disorders, pathological lying and was overprotective and anxious with her children. Over the past several years she had been calling crisis lines continually, and presented to the court a long-distance bill of \$11,800. Jones J. made a global award of \$50,000 and explained "this is a matter that is impossible to quantify and as much as anything this award is simply a reflection of society's repugnance with the behaviour described making an acknowledgement to the plaintiff of the loss she has suffered. It is my understanding that in monetary return the award may be academic."⁴⁸

The case of J.B. v. R.B.,⁴⁹ involved extensive abuse of the plaintiff by her father when she was between the ages of

⁴⁷ [1993] N.B.J. No. 160 (Q.B.) (QL).

⁴⁸ Ibid. at 13.

⁴⁹ [1994] O.J. No. 324 (Gen.Div.) (QL).

eight and 23. The abuse began with touching and oral sex. By Grade 8, he was subjecting her to vaginal and anal intercourse, photographing her and giving her marijuana and alcohol. Her father worked in the bush and often took her with him. On those occasions he abused her every night. At 23, she confided in a boyfriend who took her away from the family. This created a crisis in the family, and the father sought psychiatric care. The plaintiff, now married with three children, described her feelings of guilt and shame, her low self esteem, isolation, depression and lack of trust. Although an honour student in public school she was unable to complete Grade 12 at high school. The plaintiff described her aspirations to be a geologist to which the judge responded tentatively "whether she would have gone on to study geology or could have done so, her choices were certainly limited by the defendants behaviour."⁵⁰ The judge considered that the effects were far less severe than that suffered by other survivors of child sexual abuse and awarded her \$60,000 for pain and suffering.

In M.T. v. Poirier,⁵¹ the male plaintiff was abused at age 15 by a priest to whom he had been referred for therapy. The plaintiff, who is deaf, was hugged by the priest during therapy and massage sessions and on one occasion the priest

⁵⁰ Ibid. at 34.

⁵¹ [1994] O.J. No.1046 (Gen.Div.) (Q.L.).

attempted to have intercourse with him. The plaintiff, now married with one child, and currently employed as a bushworker, suffered from anger, sexual dysfunction and nervousness. He was awarded \$11,000 for future care, \$25,000 for pain and suffering. A further \$7,500 punitive damages were awarded against the Diocese who had received warnings about the priest prior to the abuse.

In Coutts v. Popplewell,⁵² the plaintiff was abused by an employee and friend of the plaintiff's father, who managed the stable on their family farm. The plaintiff, now 37 and married with two children, worked with her sister and the defendant on the family farm. The abuse involved touching of breasts, genitals and buttocks, sexual jokes, innuendos and digital penetration between the ages of 11 and 18. He introduced both the plaintiff and her sister to drugs and alcohol. The plaintiff outlined the effects she suffered including substance abuse, sexual dysfunction, depression, and suicidal tendencies. She detailed the effects on her education and schooling. Through elementary school she was an above average student with a high IQ and a capable athlete. By grade 8 her marks dropped as she struggled to concentrate. She began to abuse substances regularly and after two attempted suicides, she was admitted to a psychiatric hospital and never returned to school. The judge accepted only some of the effects as resulting from the abuse. Many of the effects, he

⁵² [1994] B.C.J No. 884 (S.C.) (QL).

explained, resulted from the substance abuse. He awarded \$20,000 for pain and suffering, \$3,465 for future care, and \$2,565 special damages.

The most recent case is C.L.B v. F.J.B⁵³ where the female plaintiff was abused by her father continually between the ages of three and 16. The abuse began with touching, but developed soon after to oral sex and intercourse. The plaintiff, now 26, married and attending university part-time and with a part-time job, suffered from low self esteem, distrust, depression, nightmares, and sexual dysfunction. During the time of the abuse she was often truant, started substance abuse, her marks dropped, and she was nearly expelled from school. At 15 she attempted suicide. Maczo J. described the effects as "terrible psychological damage"⁵⁴ and awarded \$60,000 for pain and suffering, \$5,000 for future care and special damages of \$7,188.50.

In this chapter I have provided an overview of the child sexual abuse cases which have come before the courts in the last decade and which form the primary data of my research. I will return to these cases in the ensuing chapters as I proceed with my analysis.

In the next chapter I turn to the tort law context in which these cases have taken place. I analyze the doctrinal and conceptual frameworks which are having direct and indirect

⁵³ [1995] B.C.J. No. 965 (S.C.) (QL).

⁵⁴ Ibid. at 15.

influence on the structure and outcomes in these cases. This analysis is informed by an historical perspective of tort law in relation to harms to the person. I analyze a selection of cases in the torts of consortium and nervous shock injury in which women, for the first time, sought compensation for their injuries. I examine the concept of harm and argue that it was separated, at that time, into categories of physical and emotional and that at the same time, women's injuries became associated with emotional harm.

CHAPTER THREE

AN ACCOUNT OF THE HISTORICAL CONCEPTUAL SEPARATION OF HARM INTO CATEGORIES OF EMOTIONAL AND PHYSICAL

This chapter identifies conceptual structures established historically within the law of tort which persist in the current era and which impact upon the current claims of child sexual abuse survivors who are seeking compensation for the harms they have suffered. I argue that, historically, the legal concept of compensatable harm underwent a process of gender differentiation as women, previously excluded, sought to be included within the framework of tort law by pursuing actions for nervous shock¹ and loss of consortium.²

When the law of tort emerged in the feudal era, and indeed up until the mid-nineteenth century, the concept of harm included a range of possible compensatable effects. These effects were not distinguished or separated as they are today (particularly in instances of gender specific injury), into categories of physical and emotional. In the mid-nineteenth century, as illustrated in the case of Lynch v. Knight,³ where a female plaintiff sued for the first time for the loss of

¹ See e.g. Martha Chamallas and Linda Kerber, "Women, Mothers, and the Law of Fright: A History" (1990) 88 Michigan Law Review 815.

² See Ann Riseley, "Sex, Housework and the Law" (1981) 7 Adelaide Law Review 421.

³ (1861), 9 H.L.C. 577. [hereinafter Lynch]

consortium of her husband, women began to seek fuller inclusion within the law, as in other areas of social organization. In this precedent-setting case, the legal concept of harm was conceptually separated into two discrete categories - physical and emotional - with lasting consequences.

This chapter details how this process of differentiation occurred. I examine the emergence of tort from the old action of trespass on the case in the fourteenth century, at a time when most women were not able to pursue civil action in their own right, and any damages awarded for their injuries became the property of their husbands. Next I explore the emergence of a series of torts which arose to compensate male plaintiffs for particular types of interference within the familial relationship and examine the changes that occurred when women sought to be included within the scope of these new torts.

On the one hand is the tort of consortium, originally defined as a loss of society, comfort and aid.⁴ This tort was subsequently narrowed in respect of the range and rationale of compensatable harm when women challenged the non-reciprocity of the tort. Nervous shock actions, usually brought by women in relation to negligent acts of a third party, were consistently refused recognition by judges as a compensatable injury. Their injury was classified as emotional and only in narrow, confined circumstances, such as when the plaintiff

⁴ Guy v. Livesey (1618), 79 E.R. 428. [hereinafter Guy]

feared for her own safety or was closely related to the injured person were claims successful.

On the other hand, I examine two contrasting torts available only for male plaintiffs. In these torts, harm continued to be conceptualized as a single concept including and compensating many of the same "emotional effects" denied to women when they pursued actions for loss of consortium and nervous shock. The first is seduction, an action specifically for fathers in respect of the seduction and impregnation of their daughters or for masters in respect of their female domestic servants, which persisted in the nineteenth century both in England and in Canada and indeed became increasingly popular in the latter.⁵ The second, criminal conversation, is an action specifically for husbands for the seduction of their wives, which also persisted in Canada throughout the nineteenth and early twentieth century.

The end result of the process I describe in this chapter was that emotional harm became associated with women and, conversely, women's harms became associated with the concept of emotional harm. And, at the same time, emotional harms became less compensatable. I argue that a conceptual, legally entrenched division emerged stemming from the two categories of emotional and physical harms, whereby particular classes of

⁵ See Constance Backhouse, "The Tort of Seduction: Fathers and Daughters in Nineteenth Century Canada" (1986) 44 Dalhousie Law Journal 45; Martha Bailey, "Servant Girls and Masters: The Tort of Seduction and The Support of Bastards" (1991) 10 Canadian Journal of Family Law 137.

injury were, and continue to be, located either in the "emotional and non-material" or the "physical and material" side of the division.

I. TORT LAW AND THE EMERGENCE OF HARM AS AN ALL-INCLUSIVE
CONCEPT: THE EXAMPLE OF CONSORTIUM

Tort first emerged as part of the common law system in England in the fourteenth century. The Chancery, one of the newly formed Kings courts, initiated a process whereby writs were created and issued providing a framework for persons with a grievance to have their case heard. Writs described, therefore, the circumstances in which a claim could lie. At first, circumstances were narrowly prescribed. If a complaint did not fall within the confines of an existing writ, then, unless the clerks of the Chancery were prepared to issue an entirely novel writ to begin the judicial process, no hearing would ensue. Gradually each writ became identified with a particular type of misbehaviour, and three of those actions - trespass, case and detinue - combined to form the modern law of tort.

The action of trespass commenced in the early thirteenth century as a combined civil and criminal proceeding and broadly encompassed any wrong. It functioned both to compensate the plaintiff by awarding damages and to punish the defendant with a fine which was payable to the Crown.

Gradually, in the fourteenth century, the Crown assumed responsibility in the Royal Courts for a wider range of those harms which were considered crimes and local courts dealt with the remaining wrongs to person and property. This led to the development of the two separate jurisdictions of civil and criminal.

Actions in trespass were heard in both the local and the Kings courts. In the fourteenth century most actions were heard in the local county courts, as the Kings courts would only consider the case if there was a breach of the peace, some royal interest at stake, or a situation which did not follow the criteria of any existing writ but had to be specially formulated to meet the special grievance. Gradually, those actions heard in the local courts became known as common trespass, and grew to include any act which caused a direct and forcible injury to person, land or goods. If the trespass was to the person the action was, and still is, assault, battery or false imprisonment. A significant feature of common trespass was that consequential harm did not need to be established in order to maintain an action. It was sufficient that a direct and forcible injury had occurred for damages to ensue. By contrast, those actions heard in the King's court (which became known as special trespass and later as actions on the case) included any indirect wrong which resulted in a "consequential" injury. Unlike common trespass, harm had to be established as part of the action. Actions on the case

developed to form a major part of modern tort law, including deceit, conversion, negligence, nuisance, and malicious prosecution.⁶

Actio per quod servituum amisit, an action which a master had against any person that deprived him of his servant's services, arose in the feudal era out of the action for trespass. In the hierarchical structure of feudal society, the servant was regarded as a chattel of the master who had a proprietary right to her or his services.

In the sixteenth century, the tort of per quod consortium amisit arose,⁷ also from the tort of trespass, to compensate a husband for the loss of a wife's services "as a master for his servant."⁸ According to Holdsworth "the same principles as were applied to the servant were applied to the wife. The husband's interest in his wife's consortium was considered sufficiently proprietary to support an action of trespass."⁹ Loss of consortium might result from the so-called enticement

⁶ For further reading on the emergence of tort law and the development of trespass see Glanville Williams & B.A. Hepple, Foundations of Tort (London: Butterworths, 1976), at 27-44.

⁷ For further reading on the emergence and development of consortium from a doctrinal perspective see Martel Popsecul, "Action Per Quod Amisit Consortium" (1958) 43 Saskatchewan Law Review 27; G. Fridman, "Consortium as an "Interest" in The Law of Torts" (1954) 32 Canadian Bar Review 1066; Peter Brett, "Consortium and Servituum. A History and Some Proposals" (1955) 29 Australian Law Journal 321.

⁸ Guy, supra, note 4 at 428.

⁹ History of English Law, vol.8, (3d ed.), (1923.) at 429.

of a wife to leave her husband, or it might be caused by injuries sustained by a wife after an assault or an accident caused by another's negligence. The injury was conceived as being to the husband himself, "for the action is not brought in respect of the harm done to the wife, but it is brought for the particular loss of the husband for that he lost the company of his wife, which is only a damage and a loss to himself."¹⁰ Another separate action could be brought by the wife, if joined by her husband, to compensate for any personal injury that she suffered from an assault or battery or negligent act.

The earliest recorded cases of consortium date from the late sixteenth century and lay in trespass. By the eighteenth century consortium lay in case, signalling a subtle shift in reasoning from a conceptualization of the injury as direct and forcible to a conceptualization of the injury as indirect and consequential. Now a plaintiff had to establish harm to maintain an action. Consortium was only available for husbands, in respect of their wives, and arose to compensate them partially for the loss of their wives' services but also for the loss of comfort and society which they had previously enjoyed with their wives. The tort embraced a range of compensatable effects which would be classified as emotional in the current era, but which at that time were considered material and compensatable. The early cases, then, made no

¹⁰ Guy, supra note 4 at 428.

distinction between a loss of services and a husband's feelings of loneliness, distress and anxiety.¹¹

For example, in the 1745 case of Winsmore v. Greenbank,¹² Mary left her plaintiff husband to live with the defendant. Sometime later she inherited 30,000 pounds, and, some three years after leaving her husband, she died. Her husband then sued the defendant for "maliciously and wickedly intending to injure the plaintiff, and to deprive him of the aid, assistance, comfort and society of his wife, and to raise foment and continue discords and quarrels between the plaintiff and his wife, and to alienate the affections of the wife from the plaintiff, and to deprive the plaintiff from having or receiving any advantage or benefit from the said estates."¹³ Willes. J awarded 3,000 pounds to the plaintiff on the basis that Mary had left unlawfully. The injuries

¹¹ Compensation for such effects was not exclusive to consortium. In many familiar instances of tort law other similar effects were also compensated. Since the ancient 1348 case of I.Des & Wife v. W.Des, (1348), Year-Book, Liber Assisarum, folio 99.60, the tort of assault has included compensation for fear, trauma and loss of personal dignity. In that case a tavern-keeper's wife was attacked by an irate customer swinging a hatchet at her. She successfully dodged the blade and was consequently awarded damages for her "indignity, terror, anguish, mental humiliation and suffering." Defamation cases, also, have always included compensation for injury to reputation, which commonly included loss of social esteem, loss of good health, and injured feelings. However, in neither of these torts was the harm characterised as emotional, but was left under the broader scope of harm.

¹² (1745), 125 E.R. 1330.

¹³ Ibid. at 1331.

themselves were not discussed. All appeared equally compensatable.

Likewise, in 1808, in Baker v. Bolton and Others¹⁴ a stagecoach accident resulted in the death of the plaintiff's wife after a month ailing in hospital. The plaintiff stated in his declaration, that "by means of the premises, the plaintiff had wholly lost, and been deprived of the comfort, fellowship, and assistance of his said wife, and had from thence hitherto suffered and undergone great grief, vexation, and anguish of mind."¹⁵ The judge found that the defendant was not entitled to damages "for his mental suffering after the moment of her death."¹⁶ He was however, entitled to recover "for the loss of his wife's society and the distress of mind he had suffered on her account"¹⁷ during the month prior to her death, and was awarded 100 pounds. His mental suffering was explicitly compensatable while she lived.

Finally, in 1855, in Stone and Wife v. Jackson,¹⁸ just six years before the first challenge by a female plaintiff to the non-reciprocity of the tort of consortium in Lynch,¹⁹ a husband brought an action against a defendant who had left an

¹⁴ (1808), 170 E.R. 1033.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ (1855), 139 E.R. 732.

¹⁹ Supra note 3.

open vault unfenced on his property. Ann, the plaintiff's wife, took a shortcut through his property and fell into the vault, "grievously bruising and injuring herself."²⁰ As a result, the plaintiff husband "lost the comfort, benefit and assistance of his said wife."²¹ He was awarded 30 pounds for his injuries. The decision focused on whether or not Ann should have been on the defendant's property. There was no discussion as to the effects of the injury, which were all considered compensatable.

II. THE CONCEPTUAL SEPARATION OF HARM INTO CATEGORIES OF PHYSICAL AND EMOTIONAL

Challenges to the Tort of Consortium by Women

When the law of tort began to develop, and indeed since the late twelfth century, women who were part of a familial relationship were not formally included within its scope. Married women by virtue of femme covert, a legal fiction whereby husband and wife were considered one entity with the legal persona located in the husband,²² could not acquire or own property apart from her husband. This affected married

²⁰ Ibid. at 733.

²¹ Ibid.

²² William Blackstone, Commentaries on the Laws of England (Chicago: University of Chicago Press, 1979) at 442. (reprint)

women in numerous ways. A husband had the right to use and enjoy whatever property his wife owned at the time of marriage or acquired during the marriage. He also had the right to her earnings and the benefit of her services. A married woman had no capacity to contract for herself or to sue or be sued in her name alone, but could join her name to her husband's to recover for an injury to her person as a consequence of an assault or battery. However, any compensation awarded became the property of her husband.²³ Because the husband and wife were one legal entity it was impossible for them to contract with each other, or to be civilly liable to each other. Although unmarried women could sue and acquire property in their own name, most women did marry and remained in their father's care until that time.

By the mid-nineteenth century, however, women began to insist that they be included more fully in the legal framework. Between 1861 and 1871, four actions were brought by women who challenged the non-reciprocity of the tort of consortium. In the 1880's a series of cases arose where women sought compensation for fright-based injuries. Both types of action were unprecedented. Nothing in either set of cases

²³ By the seventeenth century the law of equity did enable a married woman to have property settled upon her for her use under the management of a trustee. Whilst originally the court had to be satisfied that her husband was a "wastrel" or that he had deserted her, by the eighteenth century this was no longer required. See Lee Holcombe, Wives and Property. Reform of the Married Women's Property Law in Nineteenth Century England (Toronto: University of Toronto Press, 1983) at 41.

indicates what prompted these women to initiate untried actions.

It may be significant that in England at the beginning of the 1850's, 10 years prior to Lynch,²⁴ the first feminist movement had begun to form into a concrete organization. The movement was prompted in some measure by dramatic economic changes in English society which, amongst other things, saw thousands of married women move into the workforce, and many living separate from, and unsupported by, their husbands.²⁵ A major focus of the feminist movement, thus, was the need for reform in the common-law as it related to divorce and married women's property. By 1860 suffrage movements had sprung up all over England, and in 1870, after twenty years of consistent and growing pressure the first Married Women's Property Act was passed. The Act did not include most of the recommended provisions submitted in the presenting Bill, and resulted in few changes to the status of married women.²⁶ It was not

²⁴ Supra note 3.

²⁵ Holcombe, supra note 17 at 48-87.

²⁶ When the Bill reached the House of Lords, because of fervent opposition it was sent to a select committee for review. The committee struck out and replaced 14 of the 17 clauses and amended two of the remaining three. The new Bill provided that women could have as their separate property from that date on: earnings, money invested in specially registered accounts; any amount that came to them intestate, but only 200 pounds if it came to them from a will. The only provision left untouched was that which imposed upon married women the same liability for the support of their husbands and children as husbands had for their wives and children. Holcombe, supra note 17 at 177.

until 1882 that a new and comprehensive Act prompted significant changes in the status of married women.²⁷

At this time also, rapid urbanization and industrialization transformed the economy and the familial and hierachical structure of society. It is not surprising that it was a time of increasing interest in legal reform, as old laws became seen as inadequate to cope with the growth of new business structures and the facilitation of new forms of economic alliances. The common law was also in a state of disorder and was contradictory to many of the provisions of the law of equity. In the U.K. in 1850 a Royal Commission was appointed to study the procedure of the common law courts, and in particular, the divorce law. As a result, in 1857, three years before Lynch,²⁸ the Divorce Act was passed. For the first time, women who were separated or divorced and who had obtained a judicial separation decree, and women who had been deserted by their husbands, were entitled to all the same property rights as unmarried women.²⁹ Significantly then, any damages that they might receive would accrue to them. Although it is impossible to know if any of the women in the four "first" cases had obtained such a decree, three were estranged

²⁷ The passing of this Act gave married women the same rights over property as unmarried women, and provided that husbands and wives should have separate interests in property. Ibid.

²⁸ Supra note 3.

²⁹ 20 & 21 Vict., c. 85.

from their husbands in circumstances that presumed their adultery, and in which their husbands had cast them out. It is not unreasonable to contemplate therefore, as they clearly had knowledge of the civil system, that they knew of the Divorce Act and their new potential, as separated or deserted women, to receive damages in their own right.

Turning then to the cases, Lynch v. Knight³⁰ was the first in which a woman plaintiff sued for the loss of her husband's consortium. The plaintiff, Jane, sued in slander. Because slander was an action in case she had to show that special damage resulted from the injury. This meant the damage must be material and "the necessary and natural consequence of the words spoken." In previous cases, but where it was the husband who had sued for loss of consortium, judges had accepted that the harm was material and a natural consequence of the defendant's actions and within the meaning of special damage. In this case, Jane, the plaintiff, brought an action against a man who had made defamatory statements about her to her husband, claiming that she was a "notorious liar who takes delight in creating disturbances", "an infamous wretch", and "all but seduced by Dr. Casserly."³¹ Jane was consequently expelled from the marital home by her husband, and she sued the defendant for the loss of the company and society of both her husband and her husband's friends who would no longer

³⁰ Supra note 3.

³¹ Ibid. at 855.

entertain her.

Consortium had always been presumed to be a non-reciprocal tort, available only for a husband in respect of his wife. My research indicates that no woman had ever before attempted to bring an action in respect of the loss of her husband's consortium. However three of the judges gave credence to her claim accepting that, if properly joined in the action by her husband, she had a right to bring such an action. However, they decided her claim should fail. First, they held that she could not claim for that part of consortium which would constitute a pecuniary loss because that was a loss only to the husband. The remaining "emotional" harm was not a probable and natural consequence of the injury. The words, after all, did not impute actual adultery and it was merely the "idiosyncrasy" of her husband William that resulted in her being thrust from the home.

The fourth judge, Lord Wensleydale, whose dictum became strongly influential in subsequent, related developments in tort law, articulated his view of Jane's position more fully. He explicitly identified two legal categories of harm. He characterized the harm suffered by Jane as emotional and of a different character to that which a husband has in his wife.

Lord Wensleydale explained:

The assistance of the wife in the conduct of the household of the husband, and in the education of his children, resembles the service of a hired domestic, tutor or governess; it is of material value, capable of

being estimated in money....it is to the protection of such material interests that the law chiefly attends.³²

Lord Wensleydale then rendered the newly distinguished emotional loss non-compensatable, explaining that "mental pain or anxiety, the law cannot value and does not pretend to redress."³³ His statement was, and continues to be, quoted and relied upon by many judges and authors to explain the declassification and non-compensatability of emotional harm over the ensuing years.³⁴

The next year, undeterred, a woman plaintiff brought an action in similar circumstances.³⁵ In this case it was a woman friend who had imparted the slanderous words to the plaintiff Matilda: "Go in, you nasty slut, and I'll tell you what you are: you have been a whore from your cradle."³⁶ As a result the plaintiff Matilda was greatly injured in her credit and reputation and was cast out by her husband and deprived of his comfort, fellowship and support. The judges

³² Ibid. at 863.

³³ Ibid.

³⁴ See e.g., standard tort law textbooks including Allen Linden, Canadian Tort Law (5th ed.) (Toronto, Butterworths, 1993), at 363. In a discussion on the limited nature of compensation for nervous shock injury Linden uses Lord Weynesdale's statement to justify the proposition that tort has "never protected the mind except in isolated and special circumstances."

³⁵ Parkins and Matilda His Wife v. Scott and Sarah His Wife (1862), E.T. 150.

³⁶ Ibid. at 152.

expressly avoided the "difficult" question of whether a wife could sue for the loss of her husband's consortium. They decided that the action failed on the basis that Matilda had, of her own accord, repeated the slanderous words to her husband, which then resulted in her expulsion from the marital home. Interestingly, Pollock. C.B referred favourably to Lord Wensleydale's comments in Lynch³⁷ regarding the nature of the damage suffered by Matilda and stated "we ought to be careful not to introduce a new element of damage, recollecting to what a large class of actions it would apply, and what a dangerous use might be made of it."³⁸ Focusing on the altercation, rather than the damage, he concluded that the nature of the case was trivial, "In this case the words used were nothing more than a missile in the course of the vulgar abuse of one woman by another."³⁹

Two years later came the case of Roberts and Wife v. Roberts.⁴⁰ The plaintiff, Margaret, was a member of a religious sect. The defendant, a fellow member of the congregation, stated to Margaret's husband: "You have got for a wife as great a whore as any in the town of Liverpool. I had connexion with her several times; the last time a night or two

³⁷ Supra note 3.

³⁸ Ibid. at 157.

³⁹ Ibid. at 159.

⁴⁰ (1864), Q.B. 249.

before she left for Liverpool."⁴¹ As a consequence Margaret was expelled from the congregation and, as she explained was "greatly injured in her good name and reputation, and became sick and ill and greatly distressed in body and in mind."⁴² Cockburn J., despite agreeing that "the law is very cruel in preventing a woman who has thus been wantonly slandered from bringing an action for the purpose of vindicating her character"⁴³ decided that her claim must fail as she had not "shewn any substantial or material damage."⁴⁴ Her illness in body and mind was "not material,"⁴⁵ and resulted from her own particular susceptibility to such effects, and her loss of membership of the religious society was "not substantial."⁴⁶

Seven years later, in the case Davies and Wife v. Solomon,⁴⁷ the legal concept of harm was again separated in a way which resulted in the exclusion of the woman plaintiff from recovering most of the damages she claimed. The plaintiff, Isabella, brought an action for the loss of consortium of her husband. The facts were similar to the previous cases. The defendant spoke and published of Isabella,

⁴¹ Ibid. at 249.

⁴² Ibid.

⁴³ Ibid. at 250.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ (1871) L.R.Q.B. 112.

"I can prove that John Davies' wife had connection with a man named Labrach two years ago, but I would rather have the tongue cut out of my mouth than separate man and wife."⁴⁸ As a result (despite the defendant's apparent good intentions) Isabella's reputation was soiled, she was cast out by her husband and her friends would no longer entertain her. Isabella, unlike the previous claimants, was partially successful in her claim. Blackburn J. agreed that the injury was to Isabella, not to her husband, thus conceding her right to bring such a claim. However, drawing on Lord Wensleydale's conceptualization of the "different nature" of a wife's injury, he refused her compensation on the basis that her loss was non-material and therefore not special damage. He did, however, compensate her for the loss of hospitality of her friends. This he explained, was a material pecuniary loss, as she would have received free meat and drink when she was received into their houses.

The pattern that emerges from these cases is that despite the historical basis of consortium which embraced harm as a single, broad category of compensatable injury, harm was reconceptualized during this era as consisting of two categories: a material, compensatable category which encapsulated a husband's injuries and a non-material, non-compensatable category, where women's harms were relegated. This was achieved through a three step process. First,

⁴⁸ Ibid. at 113.

compensatable injury was defined as material. Second, a wife's consortium in her husband was conceptualized as being "of a different nature" to that of her husband's, and equated with non-material emotional harm. Third, emotional harm was classified as non-compensatable.

After these four cases, the scope of compensatable harm was continually narrowed in both England and in Canada. In order to maintain a claim a plaintiff had to show that she or he had sustained a loss of services. Other "emotional" harm such as a loss of society and comfort was recoverable only if accompanied by a loss of services. This precluded women from such a claim as their reciprocal harm was characterized as consisting only of a loss of society and comfort.

It is not surprising, then, that no woman appears to have sued again in either country for loss of consortium until 1951 in Best v. Samuel Fox & Co. Ltd.⁴⁹ In this case the female plaintiff sued after her husband was rendered impotent by the negligent acts of the defendant in an industrial accident. On appeal,⁵⁰ she was unsuccessful on a number of grounds, but particularly for two reasons. First, it was held that consortium consisted of a bundle of rights of which the right to sexual intercourse was but one. These rights could not be separately identified and compensated as consortium was "one

⁴⁹ 2 All E.R. 116 CA.

⁵⁰ (1952) A.C. 716 (H.L.).

and indivisible."⁵¹ The only part of that "bundle of rights" that could be separately compensated for was a loss of services. Lord Goddard explained "in truth I think that the only loss that the law can recognize is the loss of that part of consortium that is called servituum, the loss of services."⁵² Second, the judges, relying on Lord Wensleydale's conceptualization of a wife's harm, classified Mrs Best's injuries as non-material and thus non-compensatable. Lord Porter explained that in the case of a husband recovering for loss of his wife's consortium the injury to his wife is often measured by the husband's own expenses, and little is paid to non-material considerations. In the case of the wife, because she incurs no "material damage" it would "be wrong" to allow her to be compensated.

The result of both options, the "one and indivisible" principle and the "services only" principle, was to exclude women from recovery, since both required that women prove a loss of their husband's services. Those services have been consistently conceptualized as "of a different nature" to the services rendered by a wife to her husband. Thus, despite equalizing legislation allowing married women to sue in their own name and receive any damages awarded as their own property, and despite a formal acceptance of a wife's reciprocal action as legitimate, the reconceptualization of

⁵¹ Ibid. at 733.

⁵² Ibid. at 734.

harm in the tort of consortium left women with no basis to pursue a claim.⁵³

More Challenges: Claims for Nervous Shock Injury

In the mid-nineteenth century, around the same time as women began to bring actions for the loss of consortium of their husbands, a series of actions arose wherein claimants, primarily women, sought compensation for injuries that occurred after receiving a fright due to the negligence of a third party. An analysis of these cases over the ensuing century reveals a similar process to that previously detailed in the tort of consortium, whereby harm was continually reconceptualized as emotional rather than physical which resulted in the marginalization of the injuries of nervous shock claimants. First, the injury was identified as being associated with a specific "sensitive" class of claimant. Second, the injury and the consequential effects were classified as being non-physical and emotional.⁵⁴ Third,

⁵³ Consortium continues in some provinces as a non-reciprocal tort, but has been abolished by statute in British Columbia, Family Relations Act, R.S.B.C.1979, c.121, s75., and in Ontario Family Law Act, 1986, S.O. 1986, c.3 s.69. In Nova Scotia it was held to be unconstitutional under the Charter in 1986. Power v. Moss (1986), 25 N.S.C. 175.

⁵⁴ Kerber and Chamallas, supra note 1 at 816, in their historiography of the law of fright in England and the United States, argue that in these cases, women's harms, even those that were indisputably physical such as a miscarriage were classified as emotional and rendered non-compensatable.

compensation was either denied or restricted to narrow, confined circumstances.

An Australian case, Victorian Railways Commissioners v. Coultas,⁵⁵ decided by the Privy Council, was the first in which a woman plaintiff brought a claim for negligently-caused nervous shock. The case involved a near miss at a railway crossing. The plaintiff, Mary, was riding a carriage with her husband and brother, when a railroad attendant negligently signalled the buggy across the tracks despite a rapidly approaching train. The buggy successfully crossed the tracks, but the near miss resulted in injuries to Mary including "severe and nervous shock, a miscarriage, prolonged physical illness, impaired memory and eyesight."⁵⁶ She was denied recovery, first, because her injuries were "too remote" and "not to be expected in the ordinary course of things"⁵⁷ and second, because "mere nervous shock caused by the fright of an impending event which never happens results from the constitution and circumstances of the individual."⁵⁸ Thus, although carefully couched in gender neutral terms, a three part process emerged. First, Mary's injury was identified as an injury specific to those of "sensitive constitutions," namely women. Second, all of the harm, including a miscarriage

⁵⁵ (1888), 13 App. Cas. 222 P.C.

⁵⁶ Ibid. at 223.

⁵⁷ Ibid. at 225.

⁵⁸ Ibid. at 222.

and a prolonged physical illness was classified as emotional, and somewhat trivial. Third, Mary's harm was rendered non-compensatable because it was "merely" emotional.

After this case and over the next 80 years, hundreds of fright based actions were heard in England and in Canada. There were two recurring fact scenarios in the cases, the pregnant plaintiff who suffered a miscarriage after witnessing a fatal accident and the mother who suffered nervous shock when she witnessed her child's injury or death. In England, followed closely by Canada, three restrictive rules developed - the physical impact rule, the personal safety rule and the bystander rule - which allowed recovery but limited it to narrow prescribed circumstances. Although the focus in Victorian Railways Commissioners v. Coultas⁵⁹ was on the "non-physical" nature of the damage caused by the injury, these three new rules shifted the focus to the non-physical nature of the actual injury.

Until the early twentieth century the first of these new rules, the physical impact rule, denied recovery to claimants unless there was an actual physical impact to the plaintiff's person. This rule did not survive long, and was extended in Dulieu v. White & Sons⁶⁰ to include those who were put in fear of their own personal safety by the defendant's negligence. In that case the plaintiff was standing behind the

⁵⁹ Ibid.

⁶⁰ [1901] 2 K.B. 669.

bar in her husband's public house when the defendant negligently drove his horse into the room. As a result she suffered illness and gave birth to a premature and mentally disabled child. Mr. Justice Kennedy allowed recovery on the basis that the injury resulted from fear to her own personal safety. By 1925 this rule, in turn, was discarded and replaced by the bystander rule which restricted recovery to those who feared for the safety of close family members. The previous rule, focusing on the plaintiff's fear for her own personal safety was now regarded as having the potential to allow recovery for a mother "timid and lacking in motherly instinct"⁶¹ who feared only for herself and not her children. In Hambrook v. Stokes Brothers,⁶² a mother, who saw a runaway truck rushing down the road to where she had left her children, suffered nervous shock which eventually led to her death. Her husband was able to recover on the basis that she actually saw the impending accident with her own eyes, and the shock was brought about by fear for her children's safety.

Gradually, as the wider ambit resulted in an increase in successful claims, there was a subtle shift in reasoning away from the injury itself and back to the nature of the damage caused by the nervous shock. Predictably, compensation became only recoverable if the harm was "material." This has persisted and currently in Canada two further related

⁶¹ Hambrook v. Stokes Brothers, [1925] K.B. at 151.

⁶² [1925] K.B. 141.

requirements must be met before recovery can ensue. First, the damage must be more concrete and "material" than "mere emotional upset." Thus, in Duwyn v. Kaprielian,⁶³ a mother who became emotionally upset when her child was involved in a minor accident was considered to be hypersensitive and not suffering from any "material illness."⁶⁴ Because the non-physical nature of the actual injury created a supposition that the injuries are also non-physical, the requirement means recovery is limited to a narrow range of ailments which are defined by, and thus controlled by, judges and expert medical witnesses who are drawn into the process. Indeed, recently, nervous shock has been redefined as "psychiatric damage" and includes "all relevant forms of mental illness, neuroses and personality change."⁶⁵ This demarcates the narrow framework within which recovery will ensue. Diagnosis by a psychiatrist of a defined "mental illness" has become an essential facet of the claim. The second restriction is that the nervous shock, as opposed to physical injury, must be a foreseeable

⁶³ (1978), 7 C.C.L.T. 121.

⁶⁴ Justice Windeyer in an Australian case, Mount Isa Mines Ltd v. Pusey (1971), 45 A.L.J.R 88, aptly summarised the common-law position. "Sorrow does not sound in damages. A plaintiff in an action of negligence cannot recover for a 'shock' however grievous, which was no more than an immediate emotional response to a distressing experience, sudden, severe, and saddening. It is however, a known medical fact that severe emotional distress can be the starting point of a lasting disorder of mind or body...for that, damages may be had."

⁶⁵ Attia v. British Gas. [1987] 3 ALL E.R., 455.

consequence of the negligent conduct. This opens the way for the same argument used in Victorian Railways Commissioners v. Coultas⁶⁶ that such an injury would occur only to those of "sensitive constitutions" and was "not to be expected in the ordinary course of things."⁶⁷

The claims of women who suffered injury from nervous shock have been consistently limited in their recovery from the first claim in 1888⁶⁸ until the current era. The persistence of claims did result in recovery being granted in some circumstances. However, claims were, and continue to be, severely limited by rules that stemmed from the original conceptualization of the injury as non-physical, and the ensuing harm as emotional and therefore non or less compensatable. Recovery was first restricted by focusing on the non-physical nature of the actual injury. The physical impact rule, the personal safety rule and the bystander rule, were focused on a supposition that there should be physical

⁶⁶ Supra, note 52 at 225.

⁶⁷ Indeed, in England, as recently as 1994, a male plaintiff who witnessed a terrifying series of massive explosions on an oil rig was denied compensation on those very grounds. The plaintiff, who was on board a nearby rescue ship during the accident, witnessed burning crew members jumping into the sea, lifeboats capsizing, and the destruction of a rescue boat. He suffered "psychiatric damage" as a result. Although Stuart-Smith J. acknowledged that the plaintiff had witnessed a horrifying spectacle, he found that the plaintiff "was not a man of ordinary fortitude and phlegm" and was thus susceptible to such psychiatric illness and denied recovery. McFarlane v. E.E. Caledonia Ltd., [1994] 2 All E.R. 1.

⁶⁸ Supra, note 30.

injury, or at the very least a significant threat of physical injury, either to the plaintiff or to her immediate family, before recovery should ensue. These barriers were significant and excluded many claims. Gradually, as it was accepted that physical impact was not a requirement in other circumstances and could no longer be maintained as a barrier to recovery new requirements developed refocusing on the damage itself.

The Canadian position reflects the completion of a full circle in the conceptualization of nervous shock injury. Judges initially focused on the nature of the damage resulting from the injury, whereby it was classified as emotional and occurring only to those of sensitive constitutions. Soon after, however, and over the next 80 years the focus shifted to the nature of the actual injury which was highlighted as non-physical and somehow different to other injuries. Now, in Canada judges have refocused on the "emotional" nature of the damage that results from the injury, and the "constitutions" of those who suffer from such injury. Both positions, the conceptualization of the injuries as non-physical or the conceptualization of the effects as emotion 1, do little to enhance the compensatability of nervous shock injury. The subtle shift however, from one focus to the other, illustrates the effective way that different conceptual positions can similarly result in limiting recovery for particular classes of injuries and, in this case, claimants of nervous shock injury, who are mostly women.

Counter Developments: The Torts of Seduction and Criminal Conversation

The torts of seduction and criminal conversation provide an intriguing comparison to the developments in the torts of consortium and nervous shock injury. In these torts, which remained unchallenged throughout the nineteenth and twentieth century as actions available only for male plaintiffs, harm was not reconceptualized in a way that marginalized the claims of injured men. On the contrary, harm continued, as it always had, as a concept including a range of compensatable effects. Such effects included a loss of service, grief, humiliation and injured feelings. In fact, during the nineteenth century, at precisely the time women were being denied claims for consortium and nervous shock injury, a new emphasis arose in these torts which focused on the grief, humiliation, and injured feelings suffered by the injured father or husband. It seems remarkable that these were the very effects which were being contemporaneously rendered non-compensatable in the torts of consortium and nervous shock.

The tort of seduction arose in the seventeenth century to compensate a father for the loss of his daughter's services if she became pregnant, but also to compensate him for his loss of reputation and feelings of shame and distress. It was also available for a master in respect of his female domestic servant. The harm they suffered was not distinguished or

separated into categories of physical and emotional. In Canada, in the nineteenth century, whilst servitium declined with feudalism, the number of actions for seduction accelerated.⁶⁹ Damage awards originally focused on payment for the loss of services incurred when the daughter was incapacitated from pregnancy or childbirth, the costs involved during her confinement, and the upkeep of the child. But by the mid-nineteenth century the focus for damages, both in England and Canada, was on the dishonour, distress and humiliation surrounding the seduction.⁷⁰ In Ontario, this culminated with section 2 of the 1837 Seduction Act, which expressly stated that plaintiffs no longer needed to show a specific loss of services or payment of medical services to sustain an action. Chief Justice Sir John Beverley Robinson⁷¹ interpreted the legislation as intending to compensate the primary damage of "the wound given to parental feelings, and the disgrace and injury inflicted upon the family of the person seduced."⁷² Many judges in Ontario disliked the new provisions and continued to follow England and the rest of Canada by insisting that a loss of service must be established, even if the primary damage was the grief, injured feelings and embarrassment of the plaintiff father. This

⁶⁹ Backhouse, supra note 5 at 73.

⁷⁰ Ibid. at 50.

⁷¹ Whitfield v. Todd (1843), U.C.Q.B. 223.

⁷² Ibid. at 224.

enabled them to maintain an appearance of compensating "material" harm, even when the primary concern was for the "emotional" harm suffered by the plaintiff.

Criminal conversation, an offshoot of consortium, developed in the late seventeenth century to compensate a husband for injuries resulting from his wife's adultery. It was not reciprocal and, like seduction, compensation was for the material damage suffered by the plaintiff husband as well as his stress, embarrassment, and injured feelings. Interestingly, even when the husband was living apart from his wife, he could still claim in criminal conversation suggesting that compensation for loss of services was not the primary base of the action. Instead the focus was, as in seduction, on the wound to the plaintiff's pride because of the adulterous behaviour of his wife.⁷³

Drawing Parallels: Gender Based Conceptual Separations

A comparison between the separate developments in each of the two sets of torts reveals some startling differences. While women were refused compensation in the tort of consortium for the loss of their husbands services and the

⁷³ Seduction and criminal conversation have been abolished by statute in British Columbia, Family Relations Act, R.S.B.C. 1979, c.121, s.75., Ontario, Family Law Reform Act, R.S.O. 1980, c.152, s. 69., Saskatchewan, Queens Bench Act, R.S.S. 1978, c. Q-1, s.40., and in Manitoba, Queens Bench Act, R.S.M. 1970, c.C-2, s.80.

embarrassment, distress and anxiety they suffered when rejected by their husbands and his friends, on the basis that these effects were emotional, husbands and masters received compensation for the embarrassment and distress they suffered when their wives and servants were seduced and impregnated.⁷⁴ Incredibly, at the same time that a miscarriage was being classified as emotional, non-material and non compensatable in the nervous shock cases, the presence of a pregnancy was being reclassified as physical, material and compensatable in the tort of seduction. Pregnancy, it appears, was a material effect when it was conceptualized as an injury to the father, and yet it was an emotional injury when a miscarriage occurred and the damage was properly assigned to the injured woman.

Many judges and legal scholars assume that any recovery for "emotional" harm is a recent development.⁷⁵ On the

⁷⁴ Calvert Magruder writing in 1938 attempted to explain this "anomaly." He agreed that fathers and masters were compensated for "emotional" injuries in these torts and explains, "Seduction and criminal conversation are relations that the law wishes to protect...it is only because this kind of conduct almost universally outrages the sensibilities and tenderest emotions, that the law of torts has evolved an applicable civil remedy." See "Mental and Emotional Disturbances in the Law of Tort" (1938), vol.XLIX, No 7 Harvard Law Review 1033. Gender is not part of his analysis, but nevertheless he succinctly pinpoints the dual yardstick operating in these torts and clearly identifies the plaintiffs and the nature of the conduct that the law seeks to protect.

⁷⁵ For example, even feminist authors such as Regina Graycar and Jennifer Morgan, The Hidden Gender of the Law (Leichardt, NSW: The Federation Press: 1990) at 177. In their discussion of the developments in the doctrine of recovery in nervous shock cases they state "the rule has evolved in a number of phases from the 19th century when psychiatric injuries simply were not recognized by law to the current

contrary, I suggest that the examples of consortium, seduction and criminal conversation reveal that compensation for such effects has long been an established part of the law of tort. In fact, it was the tentative inclusion of women into the legal framework, as they challenged their exclusion, which initiated the process whereby harm was separated and the compensatable scope of "emotional" harm was subsequently narrowed. This development, based on women and the particular harms they are perceived to suffer, has produced an ideal location for gender specific injuries when they arise as potentially compensatable.

In this chapter I have examined the historical process by which the legal concept of harm was conceptually divided into categories of emotional and physical. Throughout the twentieth century harm has continued to be conceptualized in this way with different levels of (non) compensatability. The development of separate categories within the law of damages to compensate material and emotional harm (pecuniary and non-pecuniary) has created a specific location for the compensation of emotional harm. In the next chapter I argue that the injuries of child sexual abuse survivors have been classified as emotional and then relegated to the non-pecuniary head of damages for pain and suffering, just as the harms suffered by women who brought actions in the torts of consortium and nervous shock injury were classified as

position..."

emotional and rendered non-compensatable.

CHAPTER FOUR

THE CHARACTERIZATION OF SEXUAL INJURY AS NON-PHYSICAL, EMOTIONAL AND NON-PECUNIARY

In this chapter I argue that the conceptual separation of harm in the mid-nineteenth century, which occurred when women sought to be included within the framework of tort law, is reflected in, and perpetuated by, the separation within the law of damages between pecuniary and non-pecuniary damages. The historical process by which women's harms were conceptualized as emotional and non-material, impacts upon the claims by child sexual abuse survivors for their lost capacity to earn. Their injury is classified as non-physical, the harm they suffer is categorized as emotional and compensation is limited to the non-pecuniary head of damages for pain and suffering which is primarily directed at the compensation of mental suffering.

In the first section of this chapter I overview the principles and rationale of the law of damages, outlining the principle of restitutio in integrum, which underlies damage assessment, and detailing the approach to assessing future loss of earnings. I focus, in particular, on the emphasis with which the Supreme Court judges in the trilogy¹ distinguished

¹ This means the plaintiff need not prove on the balance of probabilities that future loss or damage will occur, but only that there is a reasonable chance of such loss or damage

pecuniary and non-pecuniary damages and the special and differing approaches developed in the assessment of each.

In the second part of this chapter I argue that sexual injury has been conceptualized as being non-physical, and the effects of the injury categorized as being emotional, just as were the injuries suffered by women in the torts of consortium and nervous shock. The creation of separate categories of damages for material and non-material harm has created the "ideal location" for gender-specific sexual injuries. Judges have recognized the harm suffered by sexual abuse survivors, but have classified it as emotional and confined compensation to the narrowly defined and financially constrained non-pecuniary head of damages for pain and suffering. This conceptual and doctrinal structure has erected a barrier against pecuniary awards for the lost earning capacity of child sexual abuse survivors.

I. THE LEGAL CONCEPT OF DAMAGES: THE CATEGORIES OF PECUNIARY AND NON-PECUNIARY

The Emergence of Separate Compensatory Categories for Emotional and Material Harm

As the conceptual division of harm developed within the

occurring. See Ken Cooper Stephenson & Iwan Saunders, Personal Injury Damages In Canada (Toronto: Carswell Company Limited, 1981) at 84.

actions brought by injured plaintiffs in the mid-nineteenth century a corresponding development occurred in the law of remedies. A division and separation between two particular types of damages, non-pecuniary and pecuniary, developed. The separation, which became marked in the twentieth century, defined a division on the one hand between intangible, non-material harms such as emotional distress, which had previously been compensated within the broader category of harm and, on the other hand, losses which are tangible and material such as loss of future earnings.

The primary distinction in damage assessment has traditionally been between special damages and general damages. Special damages compensate for costs incurred as a result of an injury which can be specifically and definitively ascertained. These damages are mostly concerned with costs incurred prior to the trial and commonly include reimbursement for actual past lost earnings, expenses for care already purchased, and other costs which have been incurred as a direct result of the injury. General damages by contrast, encompass all future pecuniary loss, including future loss of earnings and future care, and all non-pecuniary loss. Non-pecuniary loss covers three subheads: pain and suffering, loss of amenities, and loss of expectation of life. The importance of the distinction between the two types of damages is often a matter of practice and procedure. Special damages must be particularized and strictly proven whereas general damages

need only be proven on the basis of simple probability. The rationale of the distinction is that pre-trial pecuniary losses are capable of accurate mathematical calculation as they have already been incurred, whereas future losses are more speculative.²

Leading up to 1978 a variety of approaches were used by judges in the assessment of pecuniary and non-pecuniary damages. The underlying principle of damage assessment in instances of personal injury, restitutio in integrum, is that injured persons should be returned to their pre-accident position. In the instance of pecuniary damages it has generally been accepted as an effective working principle. However, in respect of non-pecuniary damages, application of the restitutio principle has been problematic because it was not possible to return the plaintiff to her or his pre-accident position. Three approaches to non-pecuniary assessment emerged in Canada and were used randomly by judges up until the 1978 trilogy. First was the "conceptual approach" in which tangible injury was treated like property. Each part

² There are two other categories of damages. Aggravated damages, a prominent feature in the sexual abuse cases, and typically found in cases of intentional wrongdoing, are a variety of non-pecuniary damages and compensate a plaintiff for distress caused by the character of the defendant's wrongdoing. This differs from the award for pain and suffering, which is to compensate a plaintiff for the distress caused by the personal injury which results from the wrongdoing. Finally there are punitive damages which also stem from the conduct of the defendant and have a goal of deterring and punishing such conduct. Aggravated and punitive damages have fundamentally different goals than the compensatory function of the rest of damage assessment.

of the plaintiff's life, faculties and capacity to enjoy life free from pain and suffering was given an objective value. Thus, a particular amount would compensate a plaintiff for the loss of a limb, or an injury to the liver, or for mental distress. A second approach was the "personal approach" by which judges attempted to put a price on the loss of happiness suffered by any given plaintiff rather than on the loss of specified bodily assets. A third approach was the "functional approach" by which, rather than quantifying an asset or lost happiness, judges would make an assessment on the basis of what was needed to provide solace and a reasonable amount of compensation for the suffering.³ In the assessment of pecuniary awards, judges also followed differing approaches, sometimes outlining a variety of factors to be taken into account, but usually arriving at a single global figure, without specifying the particular elements that constituted the award.

By the mid-1970's, judges and others involved in the legal process had become increasingly dissatisfied with the approach to damage assessment. The differing approaches to non-pecuniary awards were seen as subjective, speculative, and subject to great variation. The global sum, commonly used in pecuniary awards, was hard to reconsider meaningfully on appeal and did not provide any guiding principles for future

³ For further details on these three approaches see Cooper-Stephenson & Saunders, supra note 2 at 54.

cases, as there was little indication on how the judge or jury reached their assessment. The lack of uniformity, certainty, and precision, all important aspirations of modern law, convinced the judiciary and others that a firm guiding hand was needed to clarify this area of the law.

The "Trilogy": The Reshaping of Damage Assessment in Personal Injury Cases

In 1978 the Supreme Court of Canada addressed the troublesome issues that they perceived were facing damage assessment in instances of personal injury when they heard a "trilogy" of cases all involving severely disabled plaintiffs.⁴ Through these cases a specification of four main categories of personal injury damages became established: special damages, future care costs, compensation for future loss of earnings (all pecuniary losses), and non-pecuniary loss. The Supreme Court of Canada outlined new "rational" principles to underlie the award making procedure and detailed a new method by which awards were to be assessed.

The Supreme Court first revised and restated the general principles which were to underscore the application of damage awards. Dickson J. acknowledged that there can never be

⁴ Andrews v. Grand & Toy (Alta.) Ltd., [1978] 2 S.C.R. 229; Thornton v. Bd. of School Trustees of School District No. 57 (Prince George), [1978] 2 S.C.R. 267; Arnold v. Teno, [1978] 2 S.C.R. 287.

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complete or perfect compensation in personal injury cases," and as such, the award should be moderate and fair to both sides. A court should not confuse compensation with retribution nor with sympathy or compassion for the victim; nor should the ability of the defendant to pay be a consideration.⁶

The Supreme Court specified the approach to be taken in assessing both pecuniary and non-pecuniary losses, adopting a schema that expressly linked the two categories of damage awards. For pecuniary losses, the judges accepted and reinforced the restitutionary principle that there should be full compensation for all losses suffered. Plaintiffs should receive full redress for their loss of past and future wages and the cost of future medical care and all other costs. They should not be required to accept something less than full restoration of their pre-accident living conditions.⁷

By contrast, however, with regard to non-pecuniary damages, the judges reasoned that there was little hope of providing perfect compensation. The nature of such intangible losses meant that the principle of restitutio could have only limited application. Instead, recognizing that it was not possible to remove the effects of the injury and return the

⁵ Andrews, ibid at 242.

⁶ Ibid.

⁷ See W.H.R. Charles, Handbook on Assessment of Damages in Personal Injury Cases (Agincourt: Carswell, 1990).

plaintiff to her former position, the purpose of non-pecuniary damages should be regarded as being to provide the plaintiff with a "reasonable" measure of compensation. Thus, they adopted the functional approach to the assessment of such awards, stating that compensation should provide reasonable solace to the plaintiff through provision for purchase of goods and services.

Of great overall significance, Dickson J. reasoned that large non-pecuniary awards were not necessary, on the basis that claimants would be properly provided for in the form of damage awards for future care and future loss of earnings. Accordingly, he placed a cap of \$100,000 (to be inflation adjusted) on the amount that could be awarded for such losses.⁸ He justified the restricted amount on the basis that such moneys were intended to provide funds in addition to the pecuniary award "to make life more endurable"⁹ and to provide "more general physical arrangements above and beyond those relating directly to the injuries."¹⁰ In an express summation of the purpose of the new approach to the two types of awards he explained: "the result is a coordinated and interlocking basis for compensation."¹¹

⁸ In 1995, with inflation adjustment, the cap stands at around \$270,000. Andrews supra, note 4 at 262.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid. at 263.

A new method of calculating the quantum of pecuniary awards was also outlined by the Supreme Court. The judges discarded the traditional global approach to the pecuniary heads of damages in favour of an itemized approach. Statistical, actuarial and economic evidence presented by expert witnesses was an important source of data. Each head of damage was to be mathematically calculated by the court itself with the support of appropriate expert evidence. This placed a new expectation on lawyers to supply the court with the necessary statistical, actuarial and economic evidence to provide a basis on which the necessary calculations under each head could be made.

The Loss of Earnings Award

The head of damages for loss of earnings was dramatically altered by the new mathematical and itemized approach to assessment. This head of damages has traditionally been the most substantial head of damages for personal injury awards because it encompasses all prospective pecuniary gains which the plaintiff could have made but for the injury, and which she or he would not be able to make because of the injury. Although the primary focus was always on wage or income loss, more recently, other related losses have been incorporated into the award such as educational disadvantages and the loss of the value of homemaking services.

The main purpose of the loss of earnings award is to assess the severity of the injury and determine the extent to which the plaintiff's ability to work has been impaired since the injury and to project an anticipated loss over the rest of her or his life. This is then translated into a dollar figure. A lump sum must be calculated which will produce an annual income of a certain amount but will exhaust itself after a specified number of years. Statistical data must be provided to produce the premises from which the mathematical calculation can proceed and can involve considerable expense to the plaintiffs. If the necessary empirical data is not presented, judges can either make an arbitrary global award based on experience in similar cases¹² or by using what evidence there is and doing the best with it.¹³

Expert evidence must be used first, to calculate the plaintiff's annual loss of income. If the plaintiff was working at the time of the injury then her or his annual income at the time provides the starting point. A partially affected earning capacity will result in a recovery based on the difference between earnings before and after the injury. If the plaintiff had not yet entered the workforce, the procedure is considered more difficult. A body of case law has arisen to determine the procedure in these circumstances. If the plaintiff is an adult with a definite expectation of

¹² Power v. Moss (1986), 38 C.C.L.T. 225.

¹³ Meulemeesters v. Smith (1983), 38 O.R. (2d) 735 (H.C.).

entering a particular trade or profession, the calculation of the annual income will be guided by the average earnings in that trade or profession.¹⁴ When infants and young adults are injured prior to embarking on a career, particular considerations have developed in respect to calculation of their future loss of earnings based on whether the injury is permanent or temporary. If the injuries are temporary, then the child victim can make a claim for damages for a delayed education opportunity on the basis that this is a loss that indirectly affects future potential income. The general procedure is to calculate the loss caused by her or his late entry into the workforce. If the disability is permanent the courts will look to the aspirations, pre-accident academic achievement, motivation, and intelligence of the plaintiff and other factors which they deem relevant.¹⁵ This becomes more speculative and problematic if the child has not yet begun school. In this circumstance, judges still use a variety of approaches. In Arnold v. Teno,¹⁶ for example, one of the trilogy cases which involved the permanent injury to a 4 1/2 year old girl, Spence J., calculated the award by taking the midway point between her mother's annual income and the

¹⁴ See McKay v. Board of Govan School Unit No. 29 of Saskatchewan, [1968] 68 D.L.R. (2d) 519. Here the plaintiff's annual income was based on his ambition to become an architect.

¹⁵ Bogusinski v. Rashidagich, [1978] 5 W.W.R. 53.

¹⁶ Supra note 4.

poverty level as the income which she might have been reasonably expected to earn.¹⁷

After establishing the annual loss of income the plaintiff's probable length of remaining working life must be calculated. Usually the retirement age is used as the guide, multiplying the plaintiff's probable income by the number of years remaining until retirement. This might also include the expectation of a pension funded by the employer upon retirement,¹⁸ and should encompass those years that the plaintiff would have lived, even if life is now shortened by the injury.¹⁹ Once the basic amount has been calculated, living costs such as food, shelter and clothing are deducted on the basis that these expenses would have been incurred regardless of the injury and that the extra living costs as a result of the injury have already been compensated in the future care award. Because the standard of proof in such a claim is based on simple probability,²⁰ and thus is not an all or nothing amount, various deductions, called contingencies, are employed to adjust the award according to the possibilities of interrupted work in future years. This commonly includes a deduction for possible illness, accidents, strikes and, for women, the possibility of marriage, part-time

¹⁷ Ibid. at 635.

¹⁸ Boyles v. Landry, [1981] 34 N.B.R. (2d) 466.

¹⁹ See Andrews, supra note 4 at 636.

²⁰ Supra note 3.

employment and unemployment.

The gross amount is then paid to the plaintiff without income tax deducted. However, because the amount is paid in a lump sum and not periodically as it would have been had the plaintiff received the money from her or his employer, an amount is deducted for the interest the money will earn, and is balanced against the predicted inflation rate.

The changes that the trilogy brought to the assessment of future loss of earnings and the new interlocking approach introduced to the assessment of pecuniary and non-pecuniary damages have been largely ignored by judges in the child sexual abuse cases. A main impact of the trilogy, in the context of my research, was to highlight and emphasize the distinction between pecuniary and non-pecuniary damages. The development of differing rationales for each and in particular, the placement of a cap upon the amount that could be awarded under the head of damages for pain and suffering created a framework "ideally suited" for the location of women's injuries when they arise as potentially compensatable. It is in the context of the development of separate categories for emotional and material harm (pecuniary and non-pecuniary) and of a historically-replicated process in which women's harms were classified as emotional and rendered non-compensatable that claims by women who had suffered sexual injury began to reach the Canadian courts in the mid 1980's.

II. THE CLASSIFICATION OF SEXUAL INJURY AS NON-PHYSICAL, EMOTIONAL AND NON-PECUNIARY

In this section I argue that when women began to bring actions for the injuries they suffered after sexual assault and batteries, their claims, along with women's claims for loss of consortium and nervous shock, were located on the non-material, emotional side of the conceptual division of harm and compensated primarily within the non-pecuniary head of damages for pain and suffering. Conceptual devices, not unlike those identified in the torts of consortium and the nervous shock cases, were employed by the main actors in the legal process including the plaintiff herself, to classify the injury as non-physical, to classify the harm as emotional, and to confine the award to the non-pecuniary head of damages for pain and suffering.²¹

²¹ It is not my argument that such conceptual "devices" are employed in any conscious way. Rather, that the process of decision-making by judges is guided and influenced by broader social, political and historical factors outside the formal boundaries of the law. Legal reasoning is based on the principle of precedent, whereby previous decisions by authoritative courts are supposed to guide a judge to the "correct" decision. However, any given judge has the discretion to call on a wide variety of interpretations, distinctions and justifications and choose to address or ignore particular issues. Plaintiffs, defendants, lawyers and witnesses are likewise influenced by, and influence, judges in that process. It does not follow, however, that the results in particular cases, or classes of cases, are random or unpredictable. On the contrary, patterns can be distinguished

The process that I describe appears to be threefold. The injury is first differentiated from other non-sexual physical injury resulting, by definition, in a characterization of the injury as somehow non-physical. Second, the effects of the injury, including those which are clearly physical, are classified as emotional. This process is facilitated by expert witnesses, usually psychiatrists and psychologists who medicalize the harm into psychiatric or psychological categories. They are drawn into the process by the plaintiff herself, presumably with the encouragement of her lawyer, to aid in authenticating her harm as material. Judges reiterate the evidence of expert witnesses and classify all the harm as emotional. Finally, the injury, defined as non-physical, and the consequent harm as being emotional, is rendered compensatable, but is now primarily confined to the non-pecuniary head of damages for pain and suffering. That award is subject to the \$100,000 inflation adjusted cap set in the trilogy. The specific aim of the pain and suffering award, as adopted in the trilogy, to provide solace and empathy to the

and similar ways of conceptualizing particular situations can be historically replicated. The snared background, socialization and experience of many judges also yield distinctive patterns in the way they categorize, approach and resolve conflicts. Thus, the continual reconceptualization of harm in a way that marginalizes women and their injuries is not part of any conscious attempt by the judiciary to confine them to the margins, but instead is reflective of ideological structures which have operated, and continue to do so, in a wider societal context.

See also David Kairys, The Politics of Law. A Progressive Critique (New York: Pantheon Books, 1982).

victim reinforces the concept that the injuries are intangible and non-pecuniary, and discourages any solid pecuniary entitlement. In the cases judges have consistently found that such emotional harm is too remote from a lost capacity to engage in the "material" world of work. Moreover, any loss which might be construed as pecuniary has been reconceptualized as non-pecuniary and subsumed within the capped award for pain and suffering. The end result is a class of cases in which plaintiffs receive a limited award for pain and suffering and little or no compensation for their lost capacity to earn.

The Categorization of the Injury as Non-Physical

First then, sexual injury has been distinguished from other similar compensatable injury. In the nervous shock cases the injury was distinguished, first by focusing on the delicate nature of particular groups of persons, and then, in the later cases, by pinpointing the absence of a direct impact on the plaintiff's person. In both instances this led to a classification of the injury as non-physical. By contrast, in the tort of consortium claims had never rested on a direct impact on the plaintiff's person. Indeed, for four centuries husbands had been successfully claiming damages which flowed from the personal injuries inflicted on their wives as the result of the negligent acts of third parties. However,

distinguishing the injury proved not to be difficult. Judges identified a wife's service to her husband as "of a different character" to that of a husband's service to his wife, and declassified the damage she suffered as emotional.

Sexual injury, similarly, from the earliest actions, was identified as different and distinguishable from other unintentional physical injury to the person. This position was aptly summarized by Keenan J. in the 1990 case of C.(M.) v. M.(F.)²²: "It is difficult to compare injuries suffered in a motor vehicle negligence action with the injuries suffered by the victim of a brutal rape..... The injuries are so different in their nature and effect that it seems inappropriate to compare them."²³

The key to the distinction is a perception that sexual injury is somehow non-physical. In every case of child sexual abuse which I examined, the injury was described either as sexual with no physical abuse or, alternatively, as a sexual injury accompanied by physical abuse. In either instance the distinction was carefully identified and articulated.²⁴ Frequently, in the cases where there was no non-sexual violence, judges inferred that the abuse was thus consequently

²² (1990), 74 D.L.R. (4th) 129 (Q.B.).

²³ Ibid. at 135.

²⁴ One lawyer with whom I spoke explained in detail the difference between "sexual" injuries and injuries that result from a car accident. It was clear that his perception of the difference stemmed from a conceptualization of sexual injury as somehow non-physical in nature.

non-violent. Thus, in Gray v. Reeves where the plaintiff was subjected to extensive fondling and digital penetration for 8 years, but there was no other non-sexual violence, the judge stated that "there was no violence or injury to the plaintiff."²⁵

In cases where there was other violence, which included over half of the cases in the data set, the sexual assaults were carefully distinguished and separated from the other non-sexual physical abuse. Thus, in Brandner v. Brandner²⁶ the psychologist described the plaintiff as "the worst case of a sexually damaged person ever encountered."²⁷ Implicitly then, sexual damage was characterized as different from physical damage. Thus, the presence of sexual abuse, even if accompanied by other non-sexual physical abuse, has placed the cases into a category of "non-physical" injury.

The recent case of A.D.Y v. M.Y.Y & D.E.Y²⁸ illustrates the point well. In this case a young boy was violently abused by his parents but without any sexual assault. The absence of sexual abuse was specifically noted by the judge, who detected "a striking resemblance to Beaudry v. Hackett except for the element of sexual abuse."²⁹ In the absence of previous

²⁵ (1992), 64 B.C.L.R. (2d) 275 (S.C.).

²⁶ (1991), 71 Man.R. (2d) 265 (Q.B.).

²⁷ Ibid. at 270.

²⁸ [1994] B.C.J. No. 375 (S.C.) (QL).

²⁹ Ibid. at 12.

decisions in which damages were awarded for the physical abuse of children he referred to the cases of child sexual abuse for guidance. He agreed with the expert psychiatrist who stated "the plaintiff has suffered effects and will continue to face difficulties similar to those suffered and faced by survivors of sexual abuse."³⁰ The effects of the abuse were described as both physical and emotional, but it is the emotional effects that the judge focused on when he awarded \$85,000 for pain and suffering and a large \$125,000 for future loss of earnings. The physical characterization of the injury, and the actual absence of sexual abuse, appeared to preclude the positioning of the case into that class of injury that is located on the emotional, non-material, non-pecuniary side of the division of harm. The "emotional" effects that resulted from the "physical" injury were not problematic for the judge in his assessment of the loss of earnings award.

The Categorization of the Effects as Emotional

Once the actual injury is conceptualized as non-physical, the second step to categorizing the entire assemblage of effects as emotional appears to follow as an inevitable consequence, at least in the case examples examined. In the nervous shock cases the phrase "mere nervous shock" consistently described miscarriage, illness, and even death.

³⁰ Ibid. at 15.

In the consortium cases, once the wife's injury was conceptualized as "of a different nature" to that of her husband's, all the harm suffered by her was categorized as emotional.

Likewise, injuries that have resulted from a sexual assault, regardless of whether the assault is accompanied by other non-sexual violence, are usually categorized in their entirety as emotional. There is an assumption evident in the cases and implicit in the discourses of all the major actors that non-physical injury will cause non-physical effects. In every case psychologists, psychiatrists, judges, lawyers and plaintiffs consistently described all the effects suffered by the plaintiff as emotional or psychological.

The compensatory status of emotional harm in the law of tort has been tenuous throughout the twentieth century and continues so in the current era. Emotional effects that flow from, or are "parasitic to", other physical effects are regarded simply as part of the total pain and suffering. However, if the harm is categorized in its entirety as emotional without any component of physical harm, considerable uncertainty is voiced by judges and legal scholars alike. Some suggest that emotional harm cannot stand alone if unaccompanied by "objective psychosomatic symptoms." In negligence at least, compensation for emotional harm unaccompanied by physical harm can only be recovered if it is proven to be "material" or part of a recognized category of

mental disorder. The uncertainty, intriguingly, is frequently substantiated by reference to developments in nervous shock cases and Lord Wensleydale's statement in Lynch v. Knight.³¹

In the first reported case of child sexual abuse in Canada, Radovskis v. Tomm,³² no expert evidence was called to establish the mental suffering of the plaintiff. In this case, where a 5 1/2 year old girl was raped in a lane behind her home, the only expert evidence called was a medical doctor who described all of the immediate physical effects such as bruising, cuts, abrasions, and a torn vagina, rectum and hymen. The judge commented on the absence of expert evidence to "consider what effect the assault and rupture of the hymen would have on the future of this very young girl."³³ He compared the case to that of a 6 day old boy who had his penis partly destroyed in a circumcision operation, and focused on the harm that he perceived could be caused by her broken hymen. He decided, however, that "hymens can be broken by many means other than sexual intercourse with a male."³⁴ He awarded \$2,000 for the physical injuries she suffered commenting: "I cannot find on the evidence that the child has sustained mental suffering, as defined in the authorities, in

³¹ (1861), 9 H.L.C. 577.

³² (1957), 9 D.L.R. (2d) 751 (Q.B.).

³³ Ibid. at 753.

³⁴ Ibid. at 754.

addition to her physical injuries."³⁵

The reasoning of the judge suggests that she might have received more compensation had she shown evidence of mental suffering "as defined in the authorities."³⁶ The absence of expert evidence to authenticate any mental suffering appeared to be a factor that detracted from the compensatability of the plaintiff's harms.

And, indeed, by the time the next child sexual abuse action came to court in 1988, some 30 years later, the use of expert evidence was a crucial part of the procedure. In the cases I examined a variety of professionals were called upon as expert witnesses including psychiatrists, psychologists, family doctors, social workers, a mental health worker and a teacher. Each type of professional tended to characterize the harm in a slightly different way. For example, psychiatrists frequently characterized the harm as emotional, while psychologists tended to characterize the harm as psychological. Social workers were more likely to characterize the harm as social and/or behavioural, teachers to characterize the harm as educational or vocational, and general practitioners were more likely to characterize at least some of the harm as physical.

In the majority of cases, a psychiatrist and/or a psychologist appeared as the main expert witness for the

³⁵ Ibid. at 754.

³⁶ Ibid.

plaintiff. Interestingly, it is the plaintiffs and their lawyers who called them in as witnesses and thus provided the primary force whereby all the effects of the abuse they suffered have been medicalized into categories of medical illnesses. The uncertainty in the law regarding the status of claims for emotional harm may have facilitated plaintiffs to employ expert witnesses whose area of expertise is to diagnose and classify mental suffering into "material" categories of mental illness. Whatever the reason, their role in the cases has become increasingly visible and persuasive as more actions have been pursued over the last five years. From the "second" child sexual abuse case in 1988 until the present time, psychologists and psychiatrists have effectively facilitated the medicalization of the effects of child sexual abuse into categories of psychiatric and psychological "illnesses." They have used a variety of terms to categorize and confine the effects of the sexual abuse within their area of expertise. Every effect, new and recurring, has been consistently placed within a category of mental illness. The most comprehensive has been the diagnosis of "post traumatic stress disorder," which occurred in over half of the cases. This diagnosis frequently included all the effects of the sexual abuse, regardless of what they were. In the case of K.G. v J.T.³⁷ it included the plaintiff's difficulties at school, in J.M.T

³⁷ [1992] B.C.J. No. 1365 (S.C.) (QL).

v.A.F.D³⁸ it included the plaintiff's eating disorders and an inability to concentrate at school, and in P.C.P v. DaCosta³⁹ it included the development of a peptic ulcer.

In cases of incest the concept of "post incest syndrome" has developed to encompass all the extra effects which psychiatrists contend result from the breaking of "the close trusting familial relationship between father and daughter." In many other sexual abuse cases the plaintiffs have been diagnosed as suffering from "personality malformations", "disassociative disorders" and "dysthymia."

In eight of the cases the plaintiff suffered from an eating disorder. In each of these cases the disorder was described by the psychiatrist or the psychologist as a "psychological illness." For example, in Colquhoun v. Colquhoun,⁴⁰ the expert psychiatrist suggested that the bulimia she suffered was caused by "underlying psychological issues."⁴¹

Interestingly, on the few occasions that a physician testified, she or he described the effects primarily as physical. In S.M.Q v. Hodgkins,⁴² where the child plaintiff was abused by a family friend, the expert psychologist stated

³⁸ [1995] S.J. No. 210 (Q.B.) (QL).

³⁹ [1992] B.C.J. No. 2303 (S.C.) (QL).

⁴⁰ [1994] O.J. No.681 (Gen.Div.) (QL).

⁴¹ Ibid. at 24.

⁴² [1991] O.J. No.1606 (Gen.Div.) (QL).

that S. did not appear to suffer any obvious physical injuries as a result of the sexual abuse but that "she was not a physician and was not able to make a qualified judgement in that regard."⁴³ It is clear that each expert actively sought to remain within her or his field of expertise, and the way each classified the effects reflected their particular area of expertise.

It is not surprising, therefore, that in almost every case the judge classified the effects of the injury as emotional or psychological and reiterated the evidence of the experts, who were usually psychiatrists or psychologists. In J.M.T. v. A.F.D.,⁴⁴ after hearing the expert witness describe the "psychological" effects suffered by the plaintiff including dropping out of school at nine, eating disorders, nightmares, severe depression, an attempted suicide and pregnancy at 17, the judge concluded "except for constant headaches the effects have not had any physical base."⁴⁵

The plaintiff also, if she gave evidence or presented a sworn affidavit as to the effects of the abuse, usually described the effects as "psychological" or "emotional." As the plaintiff, in order to secure the testimony of the expert witness, had to partake in diagnostic sessions with her or him, it follows that she too would perceive of her injuries as

⁴³ Ibid. at 7.

⁴⁴ [1995] S.J. No.210 (Q.B.) (QL).

⁴⁵ Ibid. at 13.

emotional.

In this context also, the statement made to the Lawyers Weekly by the lawyer, who represented the plaintiff who received a comparatively large pain and suffering award in Brandner v. Brandner, may not be as startling as it appears "at first blush."⁴⁶ His response regarding the quantum awarded to the plaintiff, who was subjected to 11 years of constant vaginal and anal intercourse, oral sex and bestiality with the pet cat and dog, was that "it's a recognition that psychological trauma can attract significant damages. Here we're dealing with pure psychological trauma and the court has awarded \$170,000 which is a pile of money for that type of damage."⁴⁷

Apart from the influences within the legal process, there are numerous extra legal sources which may also influence the continuing categorization within the legal forum of the effects of the sexual injury as emotional. For example, the Badgley Report,⁴⁸ included an examination and categorization of all the typical effects suffered by survivors of child sexual abuse. The report carefully distinguished physical harm

⁴⁶ Don Brillinger, "Manitoba Woman Awarded \$170,000 for Sex Assaults by Father During Childhood", The Lawyers Weekly, 12 April 1991, at 1.

⁴⁷ Ibid. at 2.

⁴⁸ Report of the Committee on Sexual Offenses Against Children and Youths, Sexual Offenses Against Children by Robin Badgley et al. (Ottawa: Canadian Publishing Centre, August 1984).

from emotional harm. Only immediate physical lacerations such as bruises, cuts and tears were classified as physical. All other effects were classified as emotional: irritability, anxiety, angry outbursts, depression, withdrawal, poor performance at school, truancy, disturbed sleep, nightmares, vomiting, nausea, overeating, embarrassment, suicidal behaviour, drug and alcohol use, sexual dysfunction, distrust of men and those in authority, lack of self esteem, and other "psychological" disorders including "post stress traumatic syndrome", enuresis, encopresis, anuresis, and dysuria.

The Badgley Report was concerned with detailing the vast and varied effects of child sexual abuse upon survivors. The separation of those effects into categories of physical and emotional simply followed the divisions previously established in the cases. Nevertheless, it provides another example of the acceptance of a dividing line between emotional and physical harm, which, in the context of the differing compensatability of each, is significant.

Many of the effects described as emotional by plaintiffs, by expert witnesses, and detailed in the Badgley Report, could, if it is possible to convincingly separate harm into categories of physical or emotional, be more easily described as physical.⁴⁹ It is, in my view, tenuous to argue that such

⁴⁹ And yet, even feminist authors accept this distinction as appropriate. For example, Joyce McConnell, in "Incest as a Conundrum: Judicial Discourse on Private Wrong and Public Harm" (1992) 1 Texas Journal of Women and the Law, 143 reiterated the way the law has conceptualized sexual injuries

effects as suicide attempts, eating disorders, substance abuse, nightmares and poor educational achievement are emotional effects rather than physical. I argue instead that such effects are as tangible as broken bones and artificially differentiated in a way that marginalizes and distinguishes women's injuries. However, no challenge has been made, either by actors within the legal process or by others beyond that context, to the existence and application of that distinction.

Thus, a twofold process has emerged whereby plaintiffs have actively engaged the very actors whose expertise, and consequent role, is to confine the harm the plaintiff has suffered within categories of mental illness. On the one hand, an implicit acceptance of the categorization of all the effects as emotional, may have encouraged claimants to pursue a course of action whereby the harm they have suffered is medicalized into categories of mental disorder. Psychiatrists and psychologists are likely to effectively persuade judges that the harm suffered can be classified as an identifiable mental illness. On the other hand, however, once the injury is categorized within classes of mental disorders, the harm is inevitably entrenched within a definition that presumes all of the effects of the injuries are suitably placed within the

when she stated "a jury's job is more complicated when the injuries are primarily intangible, such as the emotional scarring caused by incest. While a broken arm causes intangible harm, for example pain and suffering, incest frequently involves exclusively intangible harm." (her emphasis)

rubric of emotional harm. This, in turn, has created a legally supported distance between the injury and claims that the injury has affected the material ability and potential of the plaintiff to work and engage in the marketplace.

The Confinement of Compensation to the Non-Pecuniary Head of Damages

The final step in the process whereby the injuries of child sexual abuse survivors are marginalized to the less compensatable damage award for pain and suffering is the conceptualization of "emotional" harm as too remote from the plaintiff's capacity to engage in the workforce. Any possible pecuniary loss is reclassified as emotional and subsumed within the non-pecuniary award.

In the 31 child sexual abuse cases that have come before the Canadian courts all but two have resulted in a finding that the sexual abuse did take place and did result in all or many of the effects suffered by the plaintiff. The awards for pain and suffering have ranged from \$5,000 to \$170,000. In only nine cases, however, have judges made a pecuniary award for loss of capacity to earn - five for future lost capacity to earn, and four for past loss of earnings. With the exception of two cases, where the plaintiffs were male, the awards have been minimal compared to awards for other types of injuries.

The conceptualization of the effects of the injuries as a collection of mental illnesses, has resulted in a marginalization of those effects as "too remote" from the potential capacity of the survivor to engage in the workforce. Yet, there was a recurring recognition by judges that the effects of the abuse were "profound", "devastating", and "extremely debilitating." In Beaudry v. Hackett,⁵⁰ Thackray J. stated: "the injuries suffered by Ms Hackett far outstrip most injuries suffered in motor vehicle accidents. The effects went on for 7 years in the active stage, have continued for 9 years, and will fester in a diminished degree into the future."⁵¹ However, judges persistently assume in the cases that such "emotional" harms have no real impact on a person's ability to engage in the workforce.

All the judges in the cases consistently relied on remoteness and lack of evidence as their reason for not making a loss of earnings award stating that the effects of the injury were too causally remote from a lost capacity to earn. Thus, in J.M.T v. A.F.D.,⁵² Matheson J. stated that "no evidence adduced that the plaintiff incurred any direct pecuniary loss as a result of the sexual assaults even to the extent of the cost to her higher education."⁵³ In C.M.K. v.

⁵⁰ [1991] B.C.J. No.3940 (S.C.) (QL).

⁵¹ Ibid. at 11.

⁵² Supra note 44.

⁵³ Ibid.

Young,⁵⁴ Shabbits J. found that a claim for a loss of income was based on a nebulous link between the effects of the abuse and the acts of the defendant. Even in the five cases where an award for future loss of earnings was made a similar pattern emerges. In two cases the award is made reluctantly, and remoteness still appears as a dominant issue. In H.(S.) v. L.(R.G)⁵⁵ Preston J. concluded that "one would expect more reliable evidence establishing the causal link between this loss and the acts of the defendant."⁵⁶ He awarded \$20,000 despite the inadequate evidence as "it is clear that the effects of the defendants acts have diminished the plaintiff's ability to earn income."⁵⁷

The two exceptions, where large loss of earnings awards were made, are actions where the plaintiffs were male. In those cases the loss was established with no mention of remoteness. In P.C.P v. DaCosta,⁵⁸ for example, the loss was assumed and discussion focused on whether the quantum should be based on a B.A graduate's wage or a law school graduate's wage.

It was equally clear that, in many of the cases, judges subsumed loss within the pain and suffering award, which, in

⁵⁴ [1994] B.C.J. No.2729 (S.C.) (QL).

⁵⁵ [1994] W.W.R. 276 (S.C.).

⁵⁶ Ibid. at 15.

⁵⁷ Ibid. at 16.

⁵⁸ [1992] B.C.J. No. 2303 (S.C.) (QL).

other types of injury, would normally result in a pecuniary award for lost capacity to earn.⁵⁹ Any loss of earnings was implicitly reconceptualized as non-material and non-pecuniary.

For instance, in H.(S.) v. L.(R.G.),⁶⁰ after making an award for pain and suffering of \$100,000, Preston J. explained that the "large" quantum of award was because, amongst other things "the damage inflicted by the defendant has negatively affected the plaintiff in many important areas of her life [including] her employment."⁶¹ Similarly in D.C v. K.C.,⁶² the award of \$60,000 for pain and suffering was partially to compensate the plaintiff for the destruction of his ability to think of himself in positive terms and his potential to function as a normal, loving, and social human being. In Harder v. Brown,⁶³ the \$40,000 award for pain and suffering included compensation for the many ways the abuse "affects her

⁵⁹ The argument that women's loss is subsumed within the pain and suffering award was raised by Jamie Cassels, "Damages for Lost Earning Capacity: Women and Children Last" (1993) 71 Canadian Bar Review 477. He argued that homemakers who suffered personal injuries were frequently compensated within the pain and suffering award for their lost capacity to earn. He cites, for example, Bourton v. England (1987), Merrit Reg. 7/84 B.C.S.C. where an injured homemaker unsuccessfully sought loss of earnings. She was compensated, however, within the pain and suffering award for her "difficulty vacuuming, peeling vegetables, cleaning out a bathtub, doing laundry; she can't garden, or wash walls, or do overhead tasks....she is no longer able to knit or sew."

⁶⁰ Supra note 55.

⁶¹ Ibid. at 11.

⁶² [1993] N.J. No.144 (S.C.) (QL).

⁶³ [1989] B.C.J. No 1453 (S.C.) (QL).

life, including her outlook towards others, her choice of friends and jobs, and her confidence in her ability to overcome life's problems."⁶⁴ In many of the other cases the effects of the abuse on schooling and employment are implicitly included within the scope of the pain and suffering award. For example, in J.B v. R.B⁶⁵ Wright J. awarded damages for pain and suffering for the following effects: "her low self esteem, lack of support from her family, and lack of friends led her to leave high school before completing grade 12. By this time she had dropped from being an honour student in public school to a failure in grade 12. Whether she would have gone on to study geology, or could have done so, her choices were certainly limited by the defendant's behaviour."⁶⁶ Finally, the most explicit example was in Brandner v. Brandner⁶⁷ where the trial judge concluded "while there may be future losses, I consider any future losses recoverable only under the rubric of non-pecuniary loss."⁶⁸

Thus, the process that emerges is reminiscent of what occurred in the torts of consortium and nervous shock injury. Once the harm is categorized as non-physical, and the ensuing effects as emotional, the final step to rendering the injury

⁶⁴ Ibid. at 20.

⁶⁵ [1994] O.J. No.324 (Gen. Div.) (QL).

⁶⁶ Ibid. at 34.

⁶⁷ Supra note 26.

⁶⁸ Ibid. at 16.

as less compensatable is easily taken. In sexual injury the "emotional" effects are conceptualized as too remote from the real world of work, and any future loss of earnings is recharacterized as non-material loss and subsumed within the narrow and restrictive category of non-pecuniary damages.

A Reality Check? Revisiting Conceptual Separations

The historic "gendering of harm" that I have described in this chapter could appear to be acontextual in the current era. Some might suggest that it merely presents an "alternate story", albeit interesting, to an ongoing historiography of the law of tort, whereby women's harms were historically declassified and marginalized. However, my argument is that the process identified in this and the previous chapter continues to re-occur in the current era. I argue that a comparison with cases where claimants have suffered whiplash injuries confirms that a discriminatory pattern, established in the mid-nineteenth century, continues to re-occur and persist in the current era.

Over the last decade, at the same time as actions for child sexual abuse began to appear before the courts, hundreds of actions were brought by plaintiffs seeking compensation for the effects of whiplash injuries. An analysis of a range of these cases, from all the provincial jurisdictions, reveals as startling a contrast to the categorization and compensatory

status of sexual injury and the ensuing harm, as seduction and criminal conversation provided to consortium and nervous shock injury in the mid-nineteenth century.

The whiplash injuries, in most of the cases I examined, were the result of a car accident, and the action proceeded under the tort of negligence. Negligence differs from intentional torts, such as assault and battery, which are usually pursued in the child sexual abuse cases, in that harm must be foreseeable and proved as part of the action.

Interestingly, the comparison between sexual abuse injuries and whiplash injuries was first raised by Matheson J. in J.M.T v. A.F.D.,⁶⁹ the most recent child sexual abuse case. He saw no difference between the effects of the whiplash injury and the effects of injuries which result from child sexual abuse. He stated: "The plaintiff's pain and suffering and loss of amenities are not dissimilar to those suffered by a whiplash victim. The source of pain cannot be readily traced to an identifiable physical injury such as a fracture or damaged organ. Yet the pain is real."⁷⁰

Indeed, the pain and suffering described by plaintiffs in whiplash cases is strikingly similar to that described by survivors of child sexual abuse. Whiplash victims have consistently reported major bouts of depression, fear, anxiety, suicide attempts and dysfunctional relationships as

⁶⁹ Supra note 44.

⁷⁰ Ibid. at 15.

symptomatic of the injury. In some of the more recent cases a "post traumatic stress syndrome" has also been associated with the injury.

In Paine v. Donovan,⁷¹ a recent 1994 case, the plaintiff suffered from whiplash and other injuries after three separate minor car accidents. Prior to the car accidents she suffered from depression, and each accident contributed to a growing number of complaints. These included, along with pain and numbness around her neck, back and legs: poor sleep patterns, nightmares, impaired concentration, "post traumatic stress disorder," chronic depression, chronic anxiety, claustrophobia, panic attacks, and sexual dysfunction. The expert witness made an assessment that 95 per cent of the plaintiff's injuries were psychological and 5 per cent were physiological. The judge then explicitly stated that the depression she suffered was the major cause of her dysfunctional state. He had no difficulty finding that she would not recover sufficiently to return to work, and awarded her massive pecuniary awards, including \$341,170 for future loss of earnings, \$119,465 for past loss of earnings, and \$32,375 for loss of house-keeping ability. He outlined the criteria for compensating such emotional injury: "mental harm will almost always be foreseeable as a consequence actually flowing from personal injury. And in any event, if developed from the physical injury, the mental harm is a subsequent

⁷¹ (1994), 47 A.C.W.S. (3d) 1202.

event (like a burn developing into a cancer) which arguably need not be foreseeable."⁷² Thus, her injuries, although primarily "emotional", did not lead to a finding that they were too remote from any loss of earnings, because they were perceived as flowing from a physical injury, and were consequently characterized as being of a physical nature.

Paine v. Donovan⁷³ is not an isolated example but part of a consistent trend of cases involving whiplash injuries in which all the effects of the injury are assumed to reduce the plaintiff's ability to engage in the workforce. In the 50 or so cases I analyzed, awards for loss of earnings ranged from \$15,000 to \$500,000 depending on the severity of the effects, the working life left to the plaintiff and other factors consistent with the general assessment principles laid down in the trilogy. Thus, in Ross v. Baal⁷⁴ the plaintiff was awarded \$45,819 for the 200 days she took off from her teaching position because of the "tension and anger" she felt as a result of the "whiplash type" injury she suffered after a minor car accident. Similarly, in Pausche v. Wood⁷⁵ the 56 year old plaintiff suffered a whiplash injury in a car accident. Soon after the accident he developed diabetes and was unable to return to work.

⁷² Ibid. at 48.

⁷³ Ibid.

⁷⁴ (1988), 11 A.C.W.S. (3d) 314.

⁷⁵ (1994), 44 A.C.W.S. (3d) 1092.

Newbury J. accepted that the diabetes was a result of the stress of the accident despite the fact that both the plaintiff's parents had developed diabetes at a similar age. There was no finding of remoteness despite the lengthy chain of causation: the accident caused the whiplash which caused the stress which caused the diabetes which caused the inability to return to work. Newbury J. did however reduce the \$399,000 claimed to \$222,000 for the loss of his remaining working years on the basis that he had not followed diet and exercise recommendations and thus had contributed to his own ill health.

Despite Matheson J.'s acknowledgement in J.M.T v. A.F.D⁷⁶ that the effects of both types of injury are similar there are some crucial differences in their respective treatment that he does not expound upon. First, the whiplash injury, unlike sexual injuries, is categorized in the cases as a physical injury. Second, the effects of that injury are classified as physical with the "emotional" effects flowing from, or "parasitic to", the physical effects. The effects of sexual injuries, by contrast, are consistently classified as emotional and flowing from a non-physical injury. In Pausche v. Wood⁷⁷ it was the diabetes that caused the inability to return to work. It did not matter in that case, and indeed it was explicitly accepted,

⁷⁶ Supra, note 44 at 77.

⁷⁷ Supra note 75.

that the diabetes was caused by stress arising from the whiplash injury, even although stress is an effect consistently classified as emotional and non-pecuniary in the child sexual abuse cases. The extra "emotional" link to the chain of causation was insignificant. And yet, in the child sexual abuse cases, that extra link has resulted in the classification of indisputably physical effects as emotional. For example, suicide attempts were classified as emotional because it was the "psychological" effect of the abuse which then prompted the physical action. Third, the whiplash action is in negligence, which requires that foreseeability and harm be established as part of the action. Emotional harm which is unaccompanied by physical harm must be established as material. It might be expected, therefore, that psychologists and psychiatrists would be a prominent feature of the cases. However, although drawn into some of the cases, they did not play a consistent or significant role. By contrast, in the sexual abuse cases where there is no requirement for harm to be established or shown to be material, psychologists and psychiatrists are always a prominent facet of the claim. Finally, and most significantly, plaintiffs who suffer whiplash injuries consistently receive large awards for their past and future lost capacity to earn even although judges explicitly agree in many cases that it is the "emotional" effects of the injury which result in the lost capacity to earn. The

whiplash injury has not resulted, either historically or currently, in a conclusion that the effects of the injury are too remote from, and do not affect, the plaintiffs ability to engage in the workforce. In that context, the emotional effects do not serve to move the whiplash injury into that class of injury that is located on the emotional, non-material, non-pecuniary side of the division of harm.

III. CONCLUDING REMARKS

In conclusion, it is hardly surprising that the harm suffered by survivors of child sexual abuse, classified as emotional and confined within established categories of mental illness, has been primarily compensated within the non-pecuniary head of damages for pain and suffering. The historically-based separation of harm into categories of emotional and physical, which developed as women pursued claims after suffering injury from nervous shock and for the loss of consortium of their husbands in the mid-nineteenth century, has impacted upon survivors of child sexual abuse in the current era. A remarkably similar "three step" process which has operated to narrowly confine or deny compensation to particular classes of injury, can be identified in each example. In each instance the injury was classified as non-physical rather than physical, the harms suffered were classified as emotional rather than physical,

and compensation denied, or confined to non-pecuniary awards rather than pecuniary. In all three of these examples the majority of the claimants were women. It is difficult to avoid the conclusion that the process by which harm was, and continues to be, conceptually divided into separate categories of (non) compensatability, is explicitly related to gender. As women sought a fuller inclusion into the law of tort their injuries became associated with emotional harm. That harm, previously compensated, became less compensatable. The development of separate categories of compensation for emotional and physical harm, has created in the current era, an "ideal location" for gender specific injuries when they emerge as potentially compensatable. In that context the cap placed upon the pain and suffering award, primarily directed at the compensation of emotional suffering, is doubly significant.

In the last two chapters I focused on developments within the narrow doctrinal context of tort law, and traced conceptual structures which have been historically-replicated within that context. Tort law however, exists within, and is part of, a wider social context. In the next chapter I argue that the relegation of women's injuries to less compensatable positions occurs as part of a broader social phenomena in which patriarchal relations are constituted and perpetuated. I argue that an underlying theme prominent in the cases is the maintenance of a

division between separate spheres of "public" and "private" and the perpetuation of the ideologically formed nuclear family paradigm. The classification of sexual injury as emotional, and the confinement of compensation to the non-pecuniary head of damages, poses no challenge to the ideological stance of that paradigm. However, claims for loss of earnings compensation pursued by women survivors, who are traditionally dependant on men within the nuclear family paradigm, are directly opposed to such ideology.

CHAPTER FIVE

THE PUBLIC/PRIVATE SPLIT, FAMILIAL IDEOLOGY, AND THE REGULATION OF WOMEN'S ACCESS TO ECONOMIC RESOURCES

Introduction

In this chapter I broaden the scope of the previous analysis, which focused on developments within the law of tort, by examining the social and ideological context in which the child sexual abuse cases are taking place. Dominant ideologies of the nuclear family paradigm, and the maintenance of a division between separate spheres of public and private are apparent in the cases and impact upon the claims of survivors for compensation for their lost capacity to earn.

I begin with an overview of feminist theories which examine the role of law in both the maintenance of a division between separate spheres of public and private and the perpetuation of the nuclear family paradigm. I look first to standard liberal accounts of the public/private split, and then to feminist critique of such theory which suggests that the division serves to maintain differing "places" for men and women within the family and the market. I look also to extensive research which, contrary to the notion of the family as a private zone of non-intervention, suggests that the law contributes to the maintenance and constitution of the nuclear

family paradigm and familial relations within that context. These theories provide the explanatory framework with which I proceed to analyze the developments in the child sexual abuse cases and posit, by placing tort law into the broader social context of which it is part, possible explanations for the process by which the harm suffered by survivors has been characterized as emotional and relegated to a less compensatable head of damages: non-pecuniary.

I argue that the maintenance of an ideology of the nuclear family paradigm, supported by notions of separate spheres of public and private which are imbued within the law, is a crucial facet of the dynamics operating in the cases. The claims of women survivors for earnings related compensation who are seeking economic independence, but who are traditionally and ideologically dependent upon men within familial economic units, conflict with dominant familial ideology. The response of the judiciary to such a challenge has been to realign survivors with their traditional roles. For women, emphasis is placed on any (heterosexual) relationships which they enter into by judges who seek to place them in a familial context. Their career aspirations and educational setbacks are consistently devalued and treated as secondary to their primary roles as wives and mothers. By contrast, for such men who attain the standard of middle-class masculinity, their aspirations and educational setbacks are valued and they are not conceptualized within a family except

in the context of breadwinner. As such, differing places for men and women in both the family and the market are constituted, maintained and perpetuated. I argue that the classification of the harm suffered by women survivors as emotional, and the relegation of their harm to the non-pecuniary head of damages for pain and suffering poses no challenge to the nuclear family paradigm. The underlying premise of that paradigm - the economic dependence of women - is left intact. Such a process illustrates the role of the law, contrary to liberal notions of non-intervention, in constituting familial relations. Ultimately women survivors, who are often severely dysfunctional from the effects of the injury, and who have often had little option but to move into economic dependency either on the state or on a male partner, are denied access to the resources which might ensure their economic independence in the future.

I. THE PUBLIC/PRIVATE SPLIT

Much feminist criticism is targeted at the separation and opposition between the "public" and the "private", constructed and supported by the legal system to the detriment of women.¹ Feminists argue that the separation between the two spheres and the construction of the family as a private zone of non-

¹ See e.g., Katherine O'Donovan, Sexual Divisions in Law (London: Weidenfeld & Nicolson, 1985).

intervention obscures the differing locations of women and men in both the family and the market.² Although women are clearly present in both spheres, their presence is grounded in, and regulated by, the sexual division of labour. Such a division, implicit in the vision of the ideal family, carries with it a sexist assignment of roles based on the traditional male-breadwinner/female-housewife model which prescribes also particular economic responsibilities. Women remain primarily responsible for child care and domestic work within the family, while men are expected to financially maintain that unit. The maintenance of the dichotomy between the two spheres becomes an effective device for maintaining the social power of men in the public sphere and the retention of patriarchal power in the private family.

Liberal Conception of Public and Private

Theorists have described the emergence of western democratic law in terms of a shift from status to contract, or from a communitarian based legal system to an individual based system.³ In the feudal era societal structures, such as the

² See Nadine Taub & Elizabeth Schneider, "Women's Subordination and the Role of Law" in David Kairys ed., The Politics of Law. A Progressive Critique (New York: Pantheon Books, 1990) at 151-177.

³ See Carol Pateman, The Sexual Contract (Stanford: Stanford University Press, 1988) 39-76; Suzanne Klein, "Individualism, Liberalism, and the New Family Law" (1985) 43 Toronto Faculty of Law Review 116 at 119; Frances Olsen, "The

family, were based on hierarchies which were enforceable by law. It was the emergence of a market society in the nineteenth century, as commerce and industry reformed, that fostered the replacement of that legal system with a system based on privately determined, contract-based relationships. This embodied a new emphasis on individualism, premised on the concept that people come together as self sufficient individuals to form a society of their choosing. Each individual was to be treated by the state as an abstract equal who maximized her or his opportunities to enter into whatever contracts they chose.⁴ For example, in the feudal era, marriage, from which numerous legally enforceable rights and obligations arose, was terminable only under limited circumstances. By contrast, the liberal perception of marriage in modern society is of an agreement entered into voluntarily by two equally situated persons.

Market society is viewed in liberal theory as being composed of independent, free-seeking, competitive individuals each of whom avidly seeks their own self interest. Law is required to regulate the potentially damaging interactions of such individuals and to stifle their natural instincts to the endless, selfish seeking of material goods. The social contract is the means by which a balance is achieved between

Family and the Market: A Study of Ideology and Legal Reform" (1983) Harvard Law Review 1497 at 1503; Sir Henry Maine, Ancient Law (London: Oxford University Press, 1931).

⁴ See Olsen, ibid. at 1522.

the competing rights of individuals, and the rights and freedoms of each individual is secured. This is characterized as an implicit agreement by all citizens to allow the state to arbitrate between individuals and to sanction those who threaten to infringe upon the freedoms of others. The social contract empowers the institutions of law which in turn ensure a well-run society.⁵

The family, by contrast, is not visualized as a site of competing individuals. Rather it is seen as being comprised of a series of complex and interconnected relationships based on intimacy, kinship and personal obligations. The good of all is to be achieved, not by each family member's pursuit of individual goals, but by their sharing and sacrifice.⁶

In that sphere it is assumed that there are no rights which need protection and no damaging interactions that need to be controlled or prevented.

The concept of a separation between the spheres of the public market and the private family is imbued in legal philosophy and informs legal policy.⁷ The public sphere, and the principles that govern it, are seen as being separate from, or independent of, the relationships in the private

⁵ See Ngaire Naffine, Law and the Sexes. Explorations in Feminist Jurisprudence (London: Allen and Unwin, 1990) at 58.

⁶ See Olsen, supra note 3 at 1505.

⁷ See O'Donovan, supra note 1 at 8.

sphere.⁸ Implicit, also, in such theory is the view that although law is necessary to regulate, organize and justify market relations, it does not, nor is it appropriate for it to, intervene in the family. The private home provides for men "a haven from the anxieties of modern life"⁹ and is "the reward for which they suffer in the earthly world of work."¹⁰ The standard liberal view therefore is that intervention in the family is to be avoided as it is an infringement upon the rights of the individual to enjoy family life in privacy. Intervention, it is said, will undermine the stability of the family, weaken family bonds, atomize family members and reduce the capacity of the family to ward off excesses of state power.¹¹

Feminist Critique of the Public/Private Split

The standard feminist critique of the public/private split is that it has furthered male domination by excluding women from the public sphere and refusing to regulate the domestic sphere. Women have been subjected to the unbridled

⁸ See Carole Pateman, "Feminist Critiques of the Public/Private Dichotomy" in S.I. Benn & G.F. Gaus eds., Public and Private in Social Life (London: Croom Helm, 1983) at 282.

⁹ See Olsen, supra note 3 at 1499.

¹⁰ Ibid.

¹¹ O'Donovan, supra note 1 at 14.

power of their husbands without recourse.¹² The historical exclusion of women from public life was also detrimental. The franchise was denied, professions such as law and medicine closed, and educational institutions inaccessible. The legacy of harm remains despite the removal of most formal barriers. Limited work opportunities exist for women together with a continuing responsibility for domestic work.¹³ Historically, the law has been conspicuously absent from the private sphere. Despite the similarity between conflicts in the private sphere and conflicts in the public sphere, the law generally refuses to recognize or interfere in ongoing family relationships. For example, interspousal immunity, immunized injuries inflicted by one spouse upon another from compensation. Also common-law and statutory definitions of rape historically provided an exception for a husband's forced intercourse with his wife.

The view that the law fails to regulate the family has been challenged by some feminist writers who argue that the law does intervene in the family but in particular and prescribed ways.¹⁴ They argue that the law actively constructs the family and the place of women within it. While law professes to confine its regulation to the public sphere and to leave people free to pursue their own lives in the

¹² See Taub & Schneider, supra note 2.

¹³ Ibid. at 152.

¹⁴ See e.g., Carol Smart, Feminism and The Power of the Law (London: Routledge, 1989); Olsen, supra note 3; O'Donovan, supra note 1.

private realm, it has been pointed out that in fact it makes numerous assumptions about the social organisation of the family and then proceeds to enforce them. As O'Donovan states:

Although the state is reluctant to intervene directly, policies in areas which impinge on the family which are expressed in legislative, judicial and administrative provisions construct a particular family form. The nuclear family, in which there is a division of labour between husband and wife, is an expression of these policies.¹⁵

The state undoubtedly shapes familial relations through its very policies and as such is clearly engaging in public action.¹⁶ Feminists have outlined the numerous structures external to the family which have a significant effect upon it. For example, state policies in areas such as employment, taxation, and social security impact upon the structure and functioning of the family. Informal mechanisms of intervention such as education, medicine, psychiatry and welfare policy also shape the family.¹⁷ Even the concept that non-intervention is a neutral stance is premised on some shared conception of proper family roles.¹⁸ As Olsen argues, any distinction between intervention and non-intervention is artificial, and the real issue is what values the state is choosing to enforce.

¹⁵ See O'Donovan, supra note 1 at 14.

¹⁶ See Margaret Thornton, "The Public/Private Dichotomy. Gendered and Discriminatory" (1991) 18 Journal of Law and Society 448 at 449.

¹⁷ See O'Donovan, supra note 1 at 14.

¹⁸ See Olsen, supra note 3 at 1505.

The two spheres of public and private are thus inextricably related. The liberal ideology implicit in the law maintains the concept of a separation, obscuring the patriarchal reality that women, although never completely excluded from the public sphere, have been, and continue to be, considerably restricted in that context. Likewise, the very notion of family privacy, justified by the division of public and private, may mystify the extent to which the family is restricted and controlled by the state and cloud the power differences between its members.¹⁹

A particular example of how the law continues to maintain, constitute and reflect that separation to the detriment of women, is in the myriad ways that the law intervenes in the family to consolidate the nuclear family paradigm. Familial ideology, the subject of significant feminist research, promotes the maintenance of the concept of separate spheres of public and private and the differing roles of men and women within each sphere. Such ideology obscures the subjection of women to men within an apparently universal, egalitarian and individualist order.²⁰ The maintenance of the nuclear family form perpetuates the economic dependence of women within the private family realm whilst promoting, protecting and reinforcing the economic independence of those

¹⁹ See Martha Fineman, The Neutered Mother. The Sexual Family and Other Twentieth Century Tragedies (New York: Routledge, 1995) at 155.

²⁰ See Pateman, supra note 8 at 283.

who thrive in the market based society, and around whose needs the law developed.

II. FAMILIAL IDEOLOGY: THE "IDEAL" FAMILY, MOTHERHOOD, AND THE ECONOMIC DEPENDENCE OF WIVES AND MOTHERS

In recent years much theorizing has emerged concerning the role that ideology plays in preserving and reproducing social and economic relations within capitalist societies. Likewise, numerous legal scholars have examined the relationship between the law and ideology focusing on the law as a site where ideologies are constructed, articulated, and conveyed.²¹ Legal feminists too have explored the interplay of ideologies which bear on issues affecting women, particularly in the area of families. They have suggested that dominant ideologies, such as familial ideology, influence the capacity of the legal system to absorb feminist-based reforms without bringing significant change to continuing discrimination against women.²²

The concept of familial ideology, often employed by

²¹ See e.g., Alan Hunt, "Law, State and Class Struggle" in Explorations in Law and Society: Towards A Constitutive Theory of Law (London: Routledge, 1993) at 17-35.

²² See e.g., Susan Boyd, "Child Custody. Ideologies and Employment" (1989-1990) 3 Canadian Journal of Women and the Law at 133. See also Shelley A.M. Gavigan, "Women, Law and Patriarchal Relations: Perspectives within the Sociology of Law" in Neil Boyd ed., The Social Dimensions of Law (Scarborough: Prentice-Hall Canada Inc., 1986) at 101.

feminists who seek to explore the continuing phenomena of patriarchal relations, embodies a number of assumptions which stem from the paradigm of the nuclear family. In the context of my research, the most significant feature of that paradigm is the underlying premise of its fundamental structure - women's economic dependency on men.²³ The ability of women to be self-sufficient is restricted by making their access to financial resources contingent on compliance with a particular form of reproductive relations. The nature of those relations within the nuclear family paradigm are controlled by ideologies of motherhood and domesticity which construct women as wives and mothers who are economically dependant on a male partner. By contrast men, who are constructed as husbands and primary breadwinners, are free from domestic responsibility and have the opportunity to be economically independent.

The Historical Development of the Nuclear Family Paradigm

Familial ideology, as it exists in the current era, has emerged over a period of time in an historical context of shifting social and economic conditions. Most theorists²⁴

²³ See Carol Smart, "Marriage, Divorce and Women's Economic Dependency" in Michael Freeman ed., The State, the Law and the Family (London: Tavistock Publications, 1984) at 9-23.

²⁴ See Olsen, supra note 3 at 1498. Also O'Donovan, supra note 1 at 16. See also M.A. Glendon, The New Family and The New Property (Toronto: Butterworths, 1981) at 13-14.

pinpoint the rise of industrial capitalism and the rapid expansion of the market economy in the early nineteenth century as the historical epoch that brought significant changes to the structure of the family and introduced the concept of the nuclear family paradigm which persists into the current era.

In the nineteenth century, as industrial employment away from the home became more prevalent than work in family enterprises²⁵ and the home was no longer a centre of manufacture, a separation between the home and family and the market was created and accentuated.²⁶ Capital replaced land as the primary form of wealth and the family became defined in terms of a husband-wife marriage bond with dependant children.²⁷ Although the Married Women's Property Acts in the nineteenth century gave women the right to earn an independent income and own property, economic reality combined with their role in the home did not, in practice, give them the opportunity to pursue such an option. The separation of home and work led to a new emphasis by women themselves on the value of home life and the importance of the provision of a

²⁵ See Olsen, ibid. at 1499.

²⁶ Ibid.

²⁷ See Mary Jane Mossman and Morag MacLean, "Family Law and Social Welfare: Toward New Equality" (1986) 5 Canadian Journal of Family Law 90.

nourishing environment for children.²⁸ Women actively engaged in strengthening the new familial form and their central role within it as wives and mothers. Many argued, maternal feminists included, that such a role in this newly constituted family form was a pinnacle to which women should aspire. They sought for women to have full expression, empowerment, and recognition within the family as wives and mothers.²⁹ The glorification of the home and the ideology of motherhood in turn reinforced the notion that women were ill suited to public life.³⁰ Although women organized themselves within social movements such as the Women's Temperance Union, social purity movements and suffrage organisations, their emphasis was on the "womanly" virtues they had to bring to political

²⁸ See Constance Backhouse, "Shifting Patterns in Nineteenth Century Canadian Custody Law" in David H. Flaherty ed., 1 Essays in the History of Canadian Law (Toronto: The Osgoode Society, 1981) at 212.

²⁹ See Nancy Cott, The Bonds of Motherhood. "Women's Sphere" in New England, 1780-1835 (London: Yale University Press, 1977) at 72, who noted that "domestic occupations began to mean for women what worldly occupations meant for men". See also Norene Pupo, "Preserving Patriarchy. Women, The Family and The State" in Nancy Mandell and Ann Duffy eds., Reconstructing The Canadian Family: Feminist Perspectives (Toronto: Butterworths, 1992) at 216.

³⁰ See Roberta Hamilton, "Women, Wives and Mothers" in Nancy Mandell and Ann Duffy eds., ibid. at 16. See also Susan Boyd, "Ideologies in Canadian Child Custody Law. From Gender Specificity to Gender Neutrality?" in Carol Smart and Selma Sevenhuijsen eds., Child Custody and the Politics of Gender (London: Routledge, 1989) at 133.

processes and public policies.³¹ Thus, while maternal feminists demanded the right to vote, to own property, to enter professions and to receive an education, they simultaneously supported the notion of the "ideal" family and women's role in that context arguing that such rights would better equip them as mothers and wives.

The concept of the family wage emerged as an adjunct to the nuclear family paradigm in the mid-nineteenth century.³² The new structure of the family, whereby husbands became increasingly the sole wage earners and which left women primarily in an unpaid capacity within a nuclear family unit, fostered the belief that the male worker ought to earn a wage sufficient to support a wife and dependant children. The "living wage" which resulted, was justified on the basis that there was a fair distribution of responsibilities between the sexes and that the family income should be provided by its "head."³³ In Canada in the late 1880's a range of legislative measures reinforced the concept of the family wage by

³¹ See Martha Minow, "Forming Under Everything That Grows: Toward A History Of Family Law" [1985] Wisconsin Law Review 877 at 879.

³² See Jane Ursel, "The State and the Maintenance of Patriarchy: A Case Study of Family, Labour and Welfare Legislation in Canada" in James Dickinson and Bob Russell eds., Family, Economy and State: The Social Reproduction Process Under Capitalism (Toronto: Garmond, 1986) at 157.

³³ See Michael Freeman, "Legal Ideologies, Patriarchal Precedents, and Domestic Violence", supra note 23 at 54. See also Carol Pateman, The Sexual Contract (Stanford: Stanford University Press, 1988) at 138.

stipulating minimum wages for women well below that of their male counterparts.³⁴

The notion of the family wage had as its inevitable partner, however, a dependant female. This was justified on the basis of the sexual division of labour. The invaluable and important work within the home that women performed was to be balanced by the money earned by her husband and to be shared by the entire family unit.³⁵ However, the reality was, and still is, that many families were unable to subsist on a single wage. Women often assumed a double burden of poorly paid employment and domestic labour in the home.³⁶

In the twentieth century, the pattern of the family changed again as the nature of wealth altered. The introduction of the welfare state resulted in wealth and status becoming more dependent on the income and employment of the individual rather than any particular position of the family in society.³⁷ However, the position of the husband and

³⁴ See Jane Ursel, supra note 32 at 168. See also Dorothy E. Chunn, From Punishment to Doing Good: Family Courts and Socialized Justice in Ontario 1880-1940 (Toronto: University of Toronto Press, 1992) at 44-48, who concludes after a study of the operation of early family courts in Ontario that the concept of the family wage informed minimum wage and child protection legislation.

³⁵ Freeman, supra note 23 at 53.

³⁶ See Jane Lewis ed., "The Working-Class Wife and Mother and State Intervention, 1870-1918" in Labour and Love: Women's Experience of Home and Family, 1850-1940 (London: Basil Blackwell, 1986) at 106. See also Pateman, supra note 3 at 138-139.

³⁷ See Mossman & MacLean, supra note 27 at 90.

father as head of the family did not change. Indeed, the nuclear family paradigm prospered and women's domestic role in that context was strengthened by numerous legislative and state-based measures such as tax credits³⁸ and family protection legislation.³⁹ The concept of the family wage has persisted despite Equal Pay legislation in the 1970's and continues to be played out with gendered occupational segregation.

The introduction of the welfare state resulted in the maintenance of the family as a privatized, nuclear, economic unit.⁴⁰ For some women who lived without male partners, the welfare state replaced economic dependency on males with dependency on the state. For others who remained in relationships with male partners, it maintained their inequalities in the family by perpetuating a particular role for women as mother, caregiver and domestic worker in the home.⁴¹ Women, married or cohabitating with male partners, have largely been excluded from any independent rights to benefits based on the assumption that their earnings are

³⁸ Canada's first Income Tax Act in 1917 allowed taxpayers with children a \$200 deduction for each dependant child. See Hamilton, supra note 30 at 20.

³⁹ See Ursel, supra note 32.

⁴⁰ See Pupo, supra note 29 at 211.

⁴¹ Ibid. at 229.

supplementary to the male breadwinner.⁴² Such economic policies have obliged women to look to men for economic security once they have married or had children.⁴³ Mossman and MacLean in their research on the development of welfare benefits in the Canadian context found that benefit entitlement has been historically monitored in a way that has distinguished the deserving poor (families with a "breadwinning head", usually male) from the undeserving poor (those with a "pauper head", usually female). They found that policy making with regard to welfare eligibility has overwhelmingly and consistently supported the nuclear family model with a breadwinning husband since its inception.⁴⁴

The Current Era. The Family and Familial Ideology

The historical emphasis and persistent conceptualization

⁴² Consider for example, the cohabitation rule which operated to end a woman's entitlement to a benefit once she began to cohabit with a male. Such a measure assumes that she should be economically dependant on any male partner and at the same time supposes that any male partner has an obligation to support her. See Carol Smart, "Marriage, Divorce and Women's Economic Dependency", supra note 23 at 11.

⁴³ It is important to recognize that the state has not, and does not, uniformly impose measures which reinforce women's dependency on men or the state. The law is uneven, shifting and sometimes contradictory, consisting of a "plurality of principles, knowledges and events". See Carol Smart, "The Power of the Law", supra note 17 at 4. Nevertheless, it is possible to identify a general trend of state practices which do reinforce such results.

⁴⁴ See Mossman & MacLean, supra note 27 at 95-100.

of the nuclear family paradigm continues in the current era despite significant changes to the family structure. An ideology of the "ideal" family is prevalent in society and is mirrored and reinforced by the law, despite documented evidence that the reality is otherwise.

Both research by feminist writers and current statistical data suggests that the "ideal" nuclear form, with a dependant wife, children and a breadwinning husband, although still dominant, is by no means the "norm" of Canadian life. According to recent Canadian statistics, 40 per cent of married or common law heterosexual couples do not have children at home, 20 per cent of women live either alone or with an unrelated person, and 20 per cent of family arrangements⁴⁵ consist of lone mothers.⁴⁶

Other research indicates that many others live in single, reconstituted, or lesbian or gay social units, or in differently organized ethnic groupings. Some feminist scholars have critiqued feminist assumptions that women of other ethnic groups live within family forms which are similarly structured

⁴⁵ Statistics Canada defines "family" as either a married couple, a common-law couple, or a living arrangement that includes children. This, of course, suggests that some people do not live within or belong to families and creates a family/not family distinction which excludes some people from the "norm" of family life.

⁴⁶ Ontario, Ministry of Industry, Science and Technology, Lone Parent Families in Canada by Colin Lindsay (Ottawa: Statistics Canada, August 1992).

to the model of the white patriarchal nuclear family.⁴⁷ Instead, they argue, many are located in differently structured extended family groups whereby women provide, and often always have, many of the economic resources for the sustenance of that group. Thus the perpetuation of the nuclear family paradigm is doubly discriminating, presuming a dependence they do not have. Significantly, other related research suggests that working-class women have always contributed to family finances, and that fathers living away from their children are unlikely to support them.⁴⁸

However, the most significant statistics are those that reflect the dramatic changes in the structure of the Canadian workforce of the current era. In 1994, 52 per cent of women, aged 15 and over, were engaged in employment for pay or profit, compared to 65 per cent of men. Thus, women represented 45 per cent of all paid workers. Of those women who were within the paid workforce: 56 per cent had children less than three years old, 57 per cent had children under six years old, and 69 per cent had children between the ages of six and 13. The statistics also showed that Aboriginal women were marginally less prominent in the workforce, although

⁴⁷ See Patricia Collins, "Shifting the Center: Race, Class and Feminist Theorizing About Motherhood" in Evelyn Nakano Glenn, Grace Chang & Linda Rennie Forcey eds., Mothering: Ideology, Experience, Agency (New York: Routledge, 1994) at 46.

⁴⁸ See O'Donovan, supra note 1 at 213.

clustered more markedly in lower paying jobs.⁴⁹ The statistics indicate overwhelmingly that women are only slightly less likely than men to engage in paid work and women who have children are more likely to engage in paid work than not. However, even when employed in paid work outside the home, women remain primarily responsible for child rearing and housework and tend to take employment that allows them to reconcile paid work with such responsibility.⁵⁰ At the same time, the importance of their income to the total family income is revealed with an estimation by Statistics Canada that five times as many families would be below the Low Income Cutoff were female incomes deducted.⁵¹

Although it is now generally accepted that women can, and do, engage in paid work outside the familial realm, this continues to be considered to be secondary and extra to her primary domestic role. This may be no surprise in the context of persistent imagery of a father at work outside the home supporting a dependent wife and children in a middle-class lifestyle which has such purchase in current advertising,

⁴⁹ Ontario, Housing, Family and Social Statistics Division Women In Canada: A Statistical Report (Ottawa: Statistics Canada, August 22, 1995).

⁵⁰ In 1994, 69 per-cent of part-time workers were women: Ibid.

⁵¹ The Low Income Cutoff is a minimum living standard set by Statistics Canada.

media, books, and promulgated throughout the education system.⁵² Notions about the kind of roles that individual members should perform within the family, what they should get out of such roles and, in particular, what the proper role of families in society is and what the state can and should do to encourage desirable family life, are perpetuated.⁵³ This promulgates an expectation that women will work, at best, as part-time workers earning "pin money." In line with such expectations, a recent study of Canadian adolescent women showed overwhelmingly that teenage girls expected to marry and be primarily responsible for child rearing and family life. They also expected to work outside the home and have their own careers, but viewed this as secondary to their other role as mother and caretaker.⁵⁴

Research suggests that the law constitutes, mirrors and prioritizes a nuclear family form in a myriad ways, despite the documented alternative realities. Familial ideologies are reproduced by legislation, judicial decisions and policy measures which attempt to replicate idealized traditional

⁵² See Ann Doris Duffy ed., "Struggling with Power: Feminist Critiques of Family Inequality", supra note 29 at 111-117, who discusses the ways that various mediums socialize men and women into accepting such prescribed roles.

⁵³ See Frances Olsen, "The Politics of Family Law" (1984) 2 Law and Inequality 1.

⁵⁴ Maureen Baker, What Will Tomorrow Bring? A Study of Aspirations of Adolescent Women, (Ottawa: Canadian Advisory Council for the Status of Women, 1993).

modes symbolized by the nuclear family.⁵⁵ Legal definitions of spouse, immigration laws recognizing only heterosexual family forms, and numerous other measures support the notion of the nuclear family. Marriage too is projected as the ideal relationship to which all should aspire by numerous legislative and policy measures which in turn contribute to the constitution of such a family form. Legislation constructs a legal ceremony which validates a heterosexual union in the form of marriage. That union is privileged by family policies, implemented both through legislation and the operation of the welfare state which often excludes relationships between lesbians, gay-men, non-sexual relationships such as extended family groupings, and at times, common-law relationships.⁵⁶ Overwhelmingly, the particular family form being reproduced is the heterosexual nuclear family, and the particular mother being reproduced is the traditional mother.⁵⁷ By constituting a particular family form, with different "places" for men and women, the law sustains the social and economic insecurity and dependence of wives and mothers. Women are left to perform the unpaid work of child rearing which in turn leaves them in a

⁵⁵ See Fineman, supra note 19 at 15.

⁵⁶ See Katherine O'Donovan, Family Law Matters (London: Pluto Press, 1993), at 31.

⁵⁷ See Susan Boyd in "Child Custody, Ideologies and Employment", supra note 22 at 120. See also Adrienne Rich, Of Woman Born (New York: Norton, 1986).

position of economic vulnerability.⁵⁸ The traditional sexual division of labour is maintained and with it women's economic dependence through the regulation and control of their access to financial resources.⁵⁹

In the legal forum, an examination of the impact of familial ideologies based on gender differences has been the focus of much feminist research where it has been argued that the law operates with a partial or incorrect vision of women's lives. Particularly, feminists have focused on family law and the various ways that assumptions about the family, and women's role in that context, have confined women within a nuclear family paradigm, although the realities they face may be quite different. Extensive historical research has been conducted,⁶⁰ together with contemporary research,⁶¹ that

⁵⁸ See O'Donovan, Family Law Matters, supra note 56 at 32.

⁵⁹ See Pateman, supra note 3 at 117-153.

⁶⁰ See Chunn, supra note 34 at 138, who found in her study of early family courts in Ontario that families who did not fit the nuclear family model were made to fit, and their familial privacy often invaded to accomplish the task. See also Michael Freeman, "Violence Against Women: Does the Legal System Provide Solutions or Itself Constitute the Problem?" (1980) 7 British Journal of Law and Society 215. Also Backhouse, supra note 28 at 212 -248.

⁶¹ See e.g, Katherine Arnup, "Lesbian Mothers and Child Custody" in Arlene Tigar McLaren ed., Gender and Society: Creating A Canadian Women's Sociology (Toronto: Copp Clark Pitman, 1988) at 36, who studied a selection of Canadian custody cases involving lesbian mothers. She found overwhelmingly that the heterosexual nuclear family form is preferred when judges choose between potential custodial parents. See Arnup, "Mothers Just Like Us: Lesbians, Divorce and Child Custody in Canada" (1989) 3 Canadian Journal of Women and the Law 18; Elizabeth Pickett, "Familial Ideology

illustrates the variety of ways that the heterosexual, patriarchal nuclear family form is reproduced, maintained and reinforced in law. Susan Boyd, for example, has conducted extensive research into the ways familial ideologies persist in child custody cases to the detriment of mothers who seek custody of their children.⁶² She has explored how changing notions of motherhood affected the law pertaining to custody disputes throughout the nineteenth and twentieth century.⁶³ She concluded that an ideology of motherhood, denoting a special responsibility in women for child rearing and domestic responsibilities, persists whereby women are not free to construct their own approaches to motherhood, and are expected

and Family Law and Mediation: Law Casts More Than a Shadow" (1991) 3 The Journal of Human Justice 27, argues that both mediation and the formal court process are influenced by dominant familial ideology. See also Mossman and MacLean, supra note 27; and Bruce Ryder, "Equality Rights and Sexual Orientation: Confronting Heterosexual Family Privilege" (1990) 9 Canadian Journal of Family Law 29.

⁶² Susan Boyd, "Child Custody, Ideologies and Employment", supra note 22 at 119. See also Boyd, supra note 30 at 128.

⁶³ Boyd, supra note 30 at 128, found however that the law consistently maintained a notion of the nuclear family paradigm as the ideal to which all should aspire. Boyd describes how women's primary role as mother, emphasized as industrialization emerged, influenced a corresponding recognition of mothering as a woman's special role in child custody law which arose in the form of the maternal preference. This preference favoured women as the natural caretakers of their children. She charts how that presumption was removed with the advent of gender neutrality in the law and was replaced by the "best interests of the child" which encourages the judiciary to underestimate the effort mothers have devoted to child care in the past and the difficulties fathers may have in assuming a primary caregiving role in the future.

to devote their lives to their children at the expense of their own needs. Those who deviate face losing custody disputes as judges usually favour a family form that closely resembles the nuclear family paradigm.

The Abstract Person of Law

Naffine adds another dimension to this analysis by arguing that the law's preference for a particular family form emanates from liberal philosophy's social vision of what represents the good life.⁶⁴ The organizing conceptual category in establishing law's impartiality is the abstract individual. The legal subject, according to the official view, is a standard individual abstracted from any particular set of social circumstances: a paradigm person whose needs and priorities law must anticipate and respond to if it is to ensure a well-run society.⁶⁵

She argues that this perception is fundamentally misconceived. The shaping of modern western law by and around market relations, characterized by an "instrumental and contractual nature", has, in her view resulted in the law being primarily focused on the activities of individuals who dominate in the public sphere.⁶⁶ A contractual emphasis suits

⁶⁴ Naffine, supra note 5 at 148.

⁶⁵ Ibid. at 51.

⁶⁶ See also Olsen, supra note 3.

the needs and fundamental priorities of those who function best in the free marketplace. Moreover, it is implicit in the theory that the law confines its activities to the public sphere, that it is for and about those who dominate that sphere. Law then, although purporting to be organized around an abstract, universal individual, is actually organized around the particular attributes and qualities of those who flourish in the type of society conceived by the law. Naffine argues that legal principles, legal priorities and legal methods all presuppose a quite specific individual whom the law serves and whose physical person and property it seeks to protect. The law's preferred person, she argues, is one who fits "remarkably well with the needs and priorities of a modern, industrial, competitive market society and who therefore flourishes within this context. He is able bodied, autonomous, rational, educated, monied, competitive, and essentially self-interested."⁶⁷ She emphasizes that men do not constitute an undifferentiated category and those that do not live up to middle-class masculinity will derive fewer benefits than the ideal man of law. She concludes that the law does not treat all classes of people equally and performs best for those persons who fit the model but operates in a much less satisfactory way for those who depart from it.

Therefore, Naffine argues, the law is quite specifically not about those whose lives are conducted within the family

⁶⁷ Naffine, supra note 5 at 52.

and whose principal concerns are family concerns. The kinds of humanist qualities that are promoted and supposed to emanate from within the private familial sphere are not reflected in the law. And yet it is to women that the law assigns the task of holding the two spheres of society together:

The man of law is assumed to be a freestanding autonomous, creature, rationally self-interested and hardheaded. On the other hand he is a being who is assumed to have and to need access to the values of Gemeinschaft, the family values, though he must not display them in his Gesellschaft life.⁶⁸

She suggests it is this contradiction which is at the heart of the liberal conception of society. It is women's work, albeit invisible, which enables the legal man to appear in the public world free of encumbrances and provides the explanation for the perpetuation of the nuclear family paradigm and the ideological stance concerning the proper division of labour within the family.

III. FAMILIAL IDEOLOGY, THE PUBLIC/PRIVATE SPLIT AND THE CHILD SEXUAL ABUSE CASE: SOME COMMON THEMES

As the preceding discussion has outlined, the law constitutes, maintains and reflects a division between the separate spheres of public and private to the detriment of women who are subsequently confined to the family in a capacity of "wife" or "mother." Although purporting not to

⁶⁸ Naffine, supra note 5 at 148.

intervene in the private sphere, the law constitutes particular relations within the family context which result in the continuing role of women in a domestic context economically dependant either on the state or on a male partner. At the same time, the law privileges individuals who display a particular set of qualities valued in a free-market society. In the child sexual abuse cases these themes are played out as judges ratify the traditional social roles of men and women within a family context. They express dismay at the disruption to the nuclear family paradigm by the actions of the very person ideologically constructed as the bastion of that family unit. Other family forms such as Aboriginal or lesbian are relegated to a "deviant" status beyond the norm of family life. Highlighting the virtues of the "intact family" judges focus on the sexual dysfunction of women plaintiffs and view favourably any (heterosexual) relationships which they are currently pursuing. At the same time conceptual barriers are constructed between women and the market or the "public" and the "private" by the undervaluation of the devastating effects of the abuse on their education and the negation of their aspirations to enter the public realm of work. By contrast, judges engage a corresponding ideology of a male breadwinner who has a special responsibility to provide economic support for a dependent wife and children. A male plaintiff must however pass the test of middle-class masculinity as access to the goodlife - sexual access to

women, control and dominance as paterfamilias, and freedom from intervention within the family - is contingent upon this. I now turn to a detailed analysis of the cases where these themes are evident.

The Breakdown of the Nuclear Family Unit

The primary focus of damage assessment, as articulated in the restitutionary principle that underlies it as discussed earlier, is to evaluate the harm suffered by plaintiffs and to return them to the position they occupied prior to the injury. However, as Sutherland⁶⁹ concluded after examining pain and suffering awards⁷⁰ in a selection of sexual assault cases, judges often focus on the conduct of the perpetrator rather than the harm that the survivor suffered. Indeed, Sutherland took the view that the "surprisingly" empathetic and compassionate perspective of judges towards survivors in sexual assault cases stemmed from outrage at the defendant's conduct rather than from a real understanding of the plaintiffs suffering.⁷¹

⁶⁹ Kate Sutherland, "Measuring Pain: Quantifying damages in Civil Suits for Sexual Assaults" in Ken Cooper-Stephenson and Elaine Gibson eds., Tort Theory (North York: Captus University Press, 1993) at 212 -234.

⁷⁰ Compensation in pain and suffering awards is to be a "fair and reasonable" award for the suffering of the plaintiff. See Dickson J. in Andrews v. Grand & Toy (Alta.) Ltd., [1978] 2 S.C.R. at 262.

⁷¹ Ibid. at 213.

Likewise my research, focusing only on child sexual abuse cases, indicates that judges have a primary concern with the conduct of the offender. In these cases, however, it is apparent that their outrage and concern is focused primarily on the breakdown of the nuclear family form by the conduct of the very person who is ideologically supposed to be the "linchpin" of the family unit and ideally positioned to provide the "love, trust and dependency" implicitly presumed in the nuclear family form.

Indeed, judges have shown consistent distress at the disruption and/or destruction of the family unit caused by the "reprehensible", "repugnant" and "vile" conduct of the offending male. They repeatedly express dismay at the failure of the patriarch to play an appropriate role in maintaining the nuclear family form, to provide a nourishing environment for his children, and for robbing the plaintiff of the normal childhood she should have had.

For instance, in Harder v. Brown⁷² Wood J. stated "deprived of love or anything approaching a normal family life, the plaintiff was highly vulnerable to the very evil which the defendant visited upon her."⁷³ The judge implicitly tied his abhorrence of the defendant's behaviour to the destruction of the nuclear unit. Perhaps the most explicit and vivid illustration of this process can be seen in the

⁷² [1989] B.C.J. No. 1453 (B.C.S.C.) (QL).

⁷³ Ibid. at 19.

judgement of J. (L.A.) v. J. (H.) and J. (J.).⁷⁴ The plaintiff was abused between the ages of 12 and 18 by her stepfather, who had lived with the family since her birth. The abuse comprised of regular sexual intercourse with a system of rewards such as money and gifts if she complied with his demands. On one occasion the plaintiff's mother caught her husband in the act of intercourse with her daughter. The father promised there would be no repetition and from that time onwards took precautions to keep the abuse hidden. At a later occasion the mother left the home and took her daughter to a shelter for abused women. However, when interviewed by a Children's Aid Society representative, who had been alerted to the possibility of sexual abuse by a co-worker at the mother's place of employment, she denied the abuse.

The plaintiff sued her mother as well as her step-father. She claimed that her mother knew of the abuse and had been negligent for not protecting her from her father, and that she had breached a fiduciary duty between parent and child. A jury decided the question of negligence, finding that the mother had indeed been negligent by not intervening to protect her daughter. Rutherford J. considered the issue of fiduciary duty, and, renaming it a "maternal fiduciary duty" he found she was in breach. He stated:

Some may think it is harsh to hold a mother to a standard by which she must, in certain circumstances, choose to take action which is destructive to her family unit.

⁷⁴ (1993), 13 O.R. (3d) 306 (Gen. Div.).

However, where serious sexual abuse of a child within a family unit must be weighed against the destruction of that unit, there can be no doubt where the balance must tip. The risks inherent in the fracturing of a family unit, in order to separate a child from abuse are infinitely preferable to the risk of the consequences of leaving an abusive situation to continue its natural conclusion.⁷⁵

The case stands out, in the context of my research, because of the significant focus on the conduct of the parents, particularly the mother. Rutherford J. summed up the harm to the plaintiff, purportedly the crucial facet of any such claim, in one small paragraph, but he detailed at great length the irreparable harm to the family unit by the conduct of the mother. Indeed, his outrage spans the entire judgement. He stated: "She gave her own personal needs paramountcy over those of her daughter, with the ironic consequences that the interests of all three members of the family unit suffered maximum damage."⁷⁶

He succinctly outlined the nature and strength of the familial ideology within which women are confined, pinpointing (unintentionally) the contradiction inherent in a conceptualization that confines women to a private sphere which is not reflective of the reality in which they live. On the one hand he suggested that she should have broken up the family unit. He stressed that she had "choices to make"⁷⁷ and

⁷⁵ Ibid. at 24.

⁷⁶ Ibid. at 25.

⁷⁷ Ibid.

that "she chose to act in ways which enabled the abuse and sexual exploitation of her daughter at the hands of the defendant father to continue."⁷⁸ He made no reference to the economic and social realities in which she lived, presuming that she remained for her own benefit. For example, he said "she preserved her interest in the benefits of having her common-law husband continuing living with her and supporting the household and in keeping her daughter with her and her common-law husband."⁷⁹ Her attempt to seek help, because of its subsequent failure was viewed as evidence of her selfish behaviour.

At the same time, he continually perpetuated an ideology which held up the nuclear family unit as "ideal". He drew on traditional assumptions about her role to nurture and protect her daughter, which appeared to outweigh the duty the father had not to abuse his daughter. The punitive damages of \$45,000 which were awarded against the mother, exceedingly rare in negligence anyway and much higher than that awarded against offending fathers in other cases, appears to perpetuate a notion that it is women who have a primary responsibility to their children which outweighs all else.

The mother was caught squarely between two contrasting ideologies, both of which operated to her detriment. The judge employed his own values by placing a maternal duty on her,

⁷⁸ Ibid.

⁷⁹ Ibid. at 26.

stressing that she should have protected her daughter at all cost. At the same time he penalized her for not dismantling the same family unit that every societal institution, including the law, and reiterated by his own discourse in the judgement, is geared towards maintaining and perpetuating. And yet, conversely, it was her position in that family unit that rendered her economically and socially dependant on her abusive spouse.⁸⁰

The model nuclear family, approved of and reinforced in the discourses of judges in the cases, is white and heterosexual. Two examples illustrate this well. In Jane Doe v. Awasis Agency of Northern Manitoba,⁸¹ the only case where the plaintiff was explicitly identified as First Nations,⁸²

⁸⁰ For further reading on this case and an analysis of the dangers of blaming non-offending parents in instances of child sexual abuse see Elizabeth Grace and Susan Vella, "Vesting Mothers With Power They Do Not Have: The Non-Offending Parent In Civil Sexual Assault Cases: J. (L.A.) v. J. (H.) and J. (J.) (1994) 7 Canadian Journal of Women and the Law 184.

⁸¹ (1990), 72 D.L.R. (4th) 738. (Q.B.)

⁸² It was not generally apparent in the written judgements whether plaintiffs were white or of other races, which makes it difficult to assess the impact of race upon the process and outcomes. Nitya Duclos in "Disappearing Women: Racial Minority Women in Human Rights Cases (1993) 6 Canadian Journal of Women and the Law 25, discovered when she examined a series of race and sex discrimination cases reported in the Canadian Human Rights Reporter from 1980 through to 1989, that the tribunals ignored the racial and gender identities of both complainants and respondents. In many cases she could not discover from the discourse of the judgement whether a complainant was a racial minority woman. The erasure of these characteristics served to deny the reality of the position of inequality of racial minority women and made it difficult to assess the system's responsiveness to racial minority women.

the judge acknowledged his preference for the white nuclear family form and provided a vivid illustration of how race is implicated in the perpetuation of that paradigm. This case involved a 13 year old Aboriginal girl who had been adopted out to white adoptive parents at birth. She was taken from her foster parents when 13 against her will and returned to her birth parents on the reserve from which she had been taken. On the reserve she was treated as an outcast, was isolated, and raped on numerous occasions.

The judge described at length the misery of the child on her return to the reserve. She could not speak the local Dene language, and her birth parents could not speak English. She mourned her foster family. The judge expressed enormous sympathy for the plaintiff and outrage at the conduct of the Awsasis Agency in removing the child from a stable (white) nuclear family form and placing her in an unstable (Aboriginal) family form. He focused on the conduct of the Agency and implicitly identified his preferred family form as he praised the stability of the foster home in which she had grown in. The proposed settlement of \$75,000 was approved by the judge who expressed reluctance at the "inadequate amount."⁸³

Likewise, the response of De Graves J. in Brandner v. Brandner,⁸⁴ to another example of a "deviant" family

⁸³ Ibid.

⁸⁴ (1991), 71 Man. R. (2d) 265. (Q.B.)

form, follows a similar pattern and may not be surprising. In this case the plaintiff was horribly abused by her father between the ages of four and 15. The plaintiff had been subjected to frequent vaginal and anal intercourse and bestiality with the pet dog and cat. De Graves J. exhibited enormous empathy for the plaintiff and outrage at the defendant's conduct. He described the plaintiff as "one of the worst sexually damaged persons ever encountered,"⁸⁵ and, in the same sentence, as "a lesbian because of her lack of trust in men."⁸⁶ Implying that her lesbianism amounted to sexual damage, he implicitly intimated that it placed her in a category so far beyond the nuclear paradigm, that she was deserving of considerable sympathy. Regarding her sexuality as a (negative) effect of the abuse the judge deplored the "normal" familial upbringing that she did not have as a child and could not have as an adult. The focus in the case was on her inability to function "normally" in a relationship and, significantly, he awarded her \$150,000, the second largest pain and suffering award to date.

Such examples explicitly illustrate a consistent trend in the cases whereby judges articulate their approval of the nuclear family paradigm and at the same time their disapproval of family forms (such as lesbian or Aboriginal), which do not fit the model of the ideal family. Their discourse, which is

⁸⁵ Ibid. at 270.

⁸⁶ Ibid.

ultimately supported by their decision-making, adds another component to the many ways that the law maintains and perpetuates the nuclear family form. Such a trend persists despite the explicit purpose of damage assessment to evaluate the harm to plaintiffs in monetary terms and to place them in the position they occupied prior to the injury. It may not, therefore, be surprising that judges, having highlighted the familial location of the abuse, give prominence to traditional assumptions about the differing roles of men and women. Indeed, they consistently have difficulty conceptualizing women survivors beyond that context and seek to place them in that realm once again.⁸⁷

Placing Women Survivors Back into a Familial Context

Conversely, and perhaps inevitably, after lamenting the breakdown of the family unit, many judges take a corresponding view that the most appropriate and beneficial location for a female survivor now and in her future years is within a functioning family unit, fulfilling her "natural" role as

⁸⁷ See Dawn Bourque, Privatisation and the "Reconstructed" Family. Recent Developments in Child Custody and Child Support in Canada (M.A. Thesis, Carleton University, 1994), who argues that child support mechanisms and access and custody arrangements have operated in Canada to maintain ties and dependence between members of a bi-nucleated family once the family form has broken down. She argues that legislation and trends within the decision-making of judges have operated as deployment techniques so as to maintain domination and control of women in the family.

mother and caretaker. Both women who are "wives" and "mothers", and those who are not, are subject to traditional assumptions which eventuate in their confinement to a nuclear family paradigm. Judges appear to assume that women or girls who are not in committed (heterosexual) relationships and do not have children will do so in the future. By contrast, women plaintiffs who are married and/or with children are assumed to have freely chosen such a role, and to have achieved a good, if not the best, career for them as women. In either instance judges assume that such a role will be their primary focus.

Numerous case examples illustrate a consistent focus by judges directed to placing women who are not "mothers" or "wives" into the "normal" familial realm they were deprived of in their childhood. It is explicit in many of the judgements involving women plaintiffs that a primary focus is being placed on the level of sexual (dys)function they suffer and a corresponding focus on their (in)ability to function "normally" in (heterosexual) relationships. Such a position, evident in the discourses of judges, is also a common theme in the discourse of psychiatrists and psychologists called as expert witnesses. Although both married and unmarried women are subject to such concerns, it is particularly evident in the cases involving women plaintiffs who do not have children or are not in committed relationships with male partners. Thus, in Beaudry v. Hackett,⁸⁸ Thackery J. spoke approvingly

⁸⁸ [1991] B.C.J No. 3940 (B.C.S.C.) (QL).

of the plaintiff's new relationship "she has a very good relationship with a young man with whom she has been living now with for some six months. This has been a beneficial situation."⁸⁹ Likewise in G v. R.⁹⁰ the judge stated "the plaintiff has established a relationship with a man who appears to be a kind, decent individual. She is now making a new life for herself."

Perhaps the most telling example can be seen in the judgement of Gray v. Reeves.⁹¹ Hall J. viewed the plaintiff's ambition to eventually marry and raise a family very favourably and actually included in the non-pecuniary award compensation for the reduced possibility of this occurring. He stated "I think the problem of establishing a good relationship with a man is a matter which should be considered in an award of general damages."⁹² In assessing the damages he compared her inability to form relationships with men with the ability of other survivors "more seriously injured" to form such relationships and even measured her future prognosis for improvement on that basis. He then went on to refuse her claim for a pecuniary award for future loss of earnings on the grounds that she had "had a fair measure of success in her educational achievements and work to date and will carry on in

⁸⁹ Ibid. at 10.

⁹⁰ [1991] B.C.J. No. 66 (Q.L.).

⁹¹ (1992), 64 B.C.L.R. (2d) 275.

⁹² Ibid. at 82.

a satisfactory way in the future."⁹³ Although the judge accepted that she had considerable ability at school, her achievement in the workforce was viewed as the fulfillment of that potential. The judge emphasized instead her ability to form (heterosexual) relationships and treated this as infinitely more serious to the plaintiffs well being than any setbacks in the workforce. Hall J.'s position made explicit that he expected the plaintiff to be primarily located in the future within a family context as a caregiver, and that her potential future in the workforce was secondary in value and in fact to that probability.

Women claimants who are mothers or wives appear to be subject to a different, but equally confining, conceptual framework. The fact that the plaintiffs were mothers or wives was consistently highlighted by judges as an important facet of their claim⁹⁴ and predictably perhaps, such claimants were not considered by judges to have any future loss of earnings.⁹⁵ Out of the 31 cases that comprised the primary

⁹³ Ibid. at 84.

⁹⁴ See further e.g., Carol Smart, "Marriage, Divorce, and Women's Economic Dependency" in Michael Freeman ed., State, Law and The Family. Critical Perspectives (London: Tavistock Publications, 1984) who discusses how such constructions invoke a picture of women in relation to children or women in relation to men.

⁹⁵ Indeed, this perception was mirrored by several of the lawyers whom I contacted and who had not made a submission on behalf of their clients for loss of earnings on the basis that they were married or had children. One explained that his client had several children by a very young age and that there

data set, 12 of the women claimants were mothers. Only one of these claimants successfully pursued a claim for future loss of earnings.⁹⁶ In that case the plaintiff had worked throughout her life running her own business which had only recently failed due to her stress and depression. The fact that she had successfully maintained her own business venture for some time may have shifted the presumption that she would otherwise have fulfilled a primary role in an unpaid capacity as a mother.

In the five cases which involved male plaintiffs it was apparent that familial ideologies were also integral to the process of assessing their claims. It was equally clear that the ideology of the "ideal" family imposed different expectations upon male plaintiffs. In two of the cases, indeed the two where future loss of earnings were awarded and the quantum was strikingly high, no reference was made by the judges to the future familial location within which the plaintiff might be situated.

In Slinn v. Morgan⁹⁷ the plaintiff was abused by his uncle between the ages of nine and 14, on weekends and summer visits. He suffered many typical symptoms of such abuse

simply was no future loss of earnings. This helped explain why some plaintiffs did not submit claims for future loss of earnings even after the first successful claim in 1991 in Beaudry v. Hackett.

⁹⁶ H. (S.) v. L. (R.G.), [1994] W.W.R. 276 (S.C.).

⁹⁷ [1993] B.C.J. No. 315 (S.C.) (QL).

including sexual dysfunction and an inability to maintain relationships. He described how he was unable to have sexual relations and could not stand to be touched by anyone. However, despite the plaintiff himself lamenting in his sworn affidavit the traditional family he thought he could never have: "I would like to have a family and a traditional household but I realise this will never be"⁹⁸, the judge made no reference to the family and focused instead on the interference to his education and career prospects. Likewise in P.C.P v. DaCosta,⁹⁹ in which the 17 year old high school boy was assaulted by his supervisor when doing summer work at a mill, there was no mention of the family he may or may not be located within in the future. Instead the judge focused on the delay to the plaintiff's progress through university.

In the remaining three cases involving male plaintiffs, one in which a loss of earnings claim was denied, and two where it appears no claim was lodged, the only reference to any future location within a family was in the context of the "troubling implications" for the sexuality of male plaintiffs abused by male perpetrators. In D.C. v. K.C.,¹⁰⁰ where a male plaintiff was horrendously abused by his father between the ages of seven and 15, Orsborn J. was concerned that the "homosexual" nature of the abuse might prevent his

⁹⁸ Ibid. at 63.

⁹⁹ [1992] B.C.J. No. 2303 (S.C.) (QL).

¹⁰⁰ [1993] N.J. No.144 (S.C.T.D.) (QL).

participation in a "normal" family unit. For example, he stated: "Perhaps the most tragic effect on D. is shown in his feelings on having a family of his own. He would very much like to have a relationship and a family, but a deep-seated fear engendered by his experience with his father has stopped any efforts he has made."¹⁰¹

In A.B. v. T.J.¹⁰² where three plaintiffs (two females, one male) brought an action against their stepfather, the male plaintiff testified to a concern about his sexuality and masculinity. The expert psychiatrist reiterated his concerns, stating "being a male victim raised a number of issues for C. as to why he was chosen, what his feelings meant and what the abuse might mean for his psychosocial development and masculinity."¹⁰³ Veit J. put great weight on this and suggested that the plaintiff would suffer "grave problems"¹⁰⁴ in the future.

In M.T. v. Poirier,¹⁰⁵ the plaintiff, 15 years at the time, was sent to a Roman Catholic Diocese to be counselled by a priest, after an incident where he exposed himself to some young girls. The priest hugged the plaintiff during therapy and massage sessions and on one occasion came to his bed and

¹⁰¹ Ibid. at 11.

¹⁰² (1991), 81 Alta. L.R. (2d) 84 (Q.B.).

¹⁰³ Ibid. at 753.

¹⁰⁴ Ibid. at 754.

¹⁰⁵ [1994] O.J. No. 1046 (Gen. Div.) (Q.L.).

attempted to have intercourse with him. The plaintiff consequently expressed a great fear of homosexuals and Boissonneault J., also confusing homosexual paedophilia with homosexuality, weighed his fears with great seriousness.

The persistence of assumptions about the family, and the differing responsibilities and duties of women and men within that context encourages decisionmaking which maintains images of the "ideal" family. Judges presume in their discourse that women who are not yet married and/or with children will in the future despite the realities that many women do not marry, have children or live in nuclear family forms. Those that are married or mothers are presumed to have achieved their potential. By making such assumptions they take from those survivors the free choice they are presumed, albeit abstractly, to have in a liberal democratic society to pursue whatever career they choose.

By contrast, male plaintiffs are not linked to or "placed" within a family, except in the context that the abuse may hinder or prevent their participation in a "normal" heterosexual family unit. The myth of the nuclear family is thus perpetuated. Moreover this ideal is not composed of form alone but carries with it an ideological stance concerning the proper division of labour within and beyond the family. This division of labour prescribes personal roles within the family and also particular economic responsibilities. In the child sexual abuse cases this is played out as the role of economic

provider is assumed to be male and women's aspirations and educational setbacks are not seen as influential in their career patterns.

"Public" Aspirations. "Private" Expectations

It was clear in the cases that women's workplace and educational aspirations were devalued creating a conceptual barrier between the familial "private" location of the abuse and the "public" work-based location of the survivors claim.¹⁰⁶ This devaluation serves to perpetuate the assumption that any paid work undertaken by women survivors will be secondary to their primary role as mother and caregiver and will likely be sporadic, trivial and of little consequence.

In many of the cases, plaintiffs outlined childhood dreams and career and educational goals which they had pursued and envisaged either in the past or currently. Many also

¹⁰⁶ By focusing on paid work in my analysis I recognise that this avoids the issue of the undervaluation of the considerable amount of unpaid work that women perform in society both within and beyond the family context. However, my case samples involve claimants who are injured at a young age and in such a way that many become unable to partake in paid employment in contrast to cases involving women injured after having made a "choice" to focus on a caregiving role. Consequently, child sexual abuse survivors may potentially be in a stronger position to make claims for their lost capacity to earn. For reading about claims for loss of earnings by injured homemakers see Denise Reaume, "Rethinking Personal Injury Damages: Compensation For Lost Capacities" (1988) 67 Canadian Bar Review 82.

described how these goals were frustrated by the past and continuing effects of the abuse. However, the responses to these aspirations by judges reveal a startling but consistent difficulty in visualising women and/or those from poorer social backgrounds in such public roles. At the same time, the career aspirations of two male plaintiffs who received sizable loss of earnings awards were treated seriously by judges, expert witnesses and the plaintiffs themselves who expressed no doubt that they would have achieved their goals, but for the abuse.

For instance, consider the following three cases where women survivors submitted claims for loss of earnings. In Brandner v. Brandner,¹⁰⁷ the plaintiff described a lifetime aspiration to be a clinical psychologist, an English professor or a social worker. De Graves J. dismissed her aspirations as too vague and "too remote" and refused her claim for future loss of earnings. In K.G v. J.T¹⁰⁸ the plaintiff submitted evidence of her school records in 1974, which indicated she had tested, at that time, with an I.Q. of 124, placing her in the upper five per cent of the population. In 1977 she was retested and scored 106. These two tests straddled the time period of the sexual abuse. In 1991, just before the hearing she tested again, but this time scored only 97. There was some evidence led by the expert psychiatrist that she may have been

¹⁰⁷ (1991), 71 Man. R. (2d) 265 (Q.B.).

¹⁰⁸ [1992] B.C.J. No. 1365 (S.C.) (QL).

intimidated by the male I.Q. test administrator and therefore that the result was not reflective of her actual ability.

The plaintiff submitted, relying on the evidence of the I.Q. testing and supported by two expert witnesses, that but for the abuse she would have gone to university and completed her doctoral degree. Parret J. treated this submission with great scepticism and regarded the possible inaccuracy of the more recent test a significant (negative) factor in her claim for future loss of earnings, even although, if anything, it reinforced the reality of her unachieved potential. He stated:

Given the inherent problems in the administration of the I.Q. test and the lack of any concrete evidence supporting Dr. Posthuma's opinion, I am not persuaded that the plaintiff would have obtained a university degree as suggested, let alone either of the postgraduate degrees suggested. The evidence and the opinion in this case is entirely too speculative and lacks any proper foundation to support such an award.¹⁰⁹

The abuse began when the plaintiff was only five years old and the effects on her life were devastating. Although I.Q. tests may be unreliable to some degree and favour particular abilities, nevertheless they provided in this instance a substantive indication as to her potential at a tertiary level. The slide in her I.Q. scores mirrored the slide in the rest of her life. At five she began stealing, vandalising and shoplifting. By eight she was skipping school, and by 13 she was heavily involved in drug and alcohol abuse. At high school she continued to skip school, finally dropping

¹⁰⁹ Ibid. at 28.

out in Grade 11. She then developed depression, eating disorders, continued abusing alcohol and drugs and attempted suicide on a number of occasions. The effects of the abuse appeared to worsen as the plaintiff grew into adulthood.¹¹⁰

The judge awarded \$15,000 and stated "it will take a period of time to get her life and career back on track but I am confident she will overcome the difficulties placed before her."¹¹¹ The award, and the judge's comments, in the context of the plaintiff's extreme debilitation and the devastating effects she suffered, can only be read as a reflection of his low perception of her potential ability in the workforce and his disregard of the impact such injuries might have on the options of young women as they grow into adulthood.

In Gray v. Reeves¹¹² the plaintiff detailed her ambition to become a Certified General Accountant. Hall J. dismissed her aspirations stating "it was not apparent to me from the evidence of the plaintiff that she had any real intention of becoming a Certified General Accountant."¹¹³ And yet, in her testimony the plaintiff illustrated a remarkable persistence in recouping the lost educational years which had resulted

¹¹⁰ Judith Herman, Trauma and Recovery (New York: Basic Books, 1992) at 110-114, describes the difficulty abused children have adapting to adulthood because they are without independence, trust, initiative and autonomy - characteristics crucial to a climate of adult responsibility.

¹¹¹ Supra note 108 at 29.

¹¹² Supra note 91.

¹¹³ Ibid. at 84.

from the abuse. She described how, after failing Grade 12, she had completed her senior matriculation by taking night courses. She successfully obtained a job soon after and began to take night courses in business management at a community college. Some time later she gained a contract employment position at the Workers Compensation Board and received excellent assessments, until 1990 when she resigned due to stress and depression. Incredibly, this is the same case where the judge made a non-pecuniary award for her lessened opportunity in establishing "a good relationship with a man." He recognized what he perceived as a lost opportunity for future economic dependence and at the same time refused to recognize a lost opportunity for future economic independence.

By contrast, in the two cases where male plaintiffs received sizable loss of earnings awards their career aspirations were treated with great seriousness by the judges. In Slinn v. Morgan,¹¹⁴ the plaintiff had dreamt since childhood of a future as an architect, which he described in detail:

From the time I was six or seven years old I always wanted to be an architect. I enjoyed sketching interiors of houses and designing changes which I felt would make those interiors more pleasing. I not only sketched houses which I saw but I also drew designs for the houses I would like to build. Over the years between the ages of seven and 18 I drew thousands of such designs. As a child and until shortly before I graduated from high school, I always assumed I would go on to University to study

¹¹⁴ Supra note 97.

architecture.¹¹⁵

The plaintiff's testimony was supported by the evidence of the expert psychiatrist who described in great detail how the plaintiff's "innate intellectual abilities had been severely compromised by having had to use most of his emotional energy to survive the abuse" and how "his educational aspirations to become an architect matched his intellectual ability but as a result of the traumatization from the chronic severe sexual abuse, it was impossible for him to take steps to actualize his educational and career hopes."¹¹⁶ Cohen J.'s response to both testimonies was "I am satisfied that the plaintiff had a real intention as well as the capacity to further his education and to achieve his career aspirations,"¹¹⁷ and awarded him \$200,000 for future loss of earnings.

Likewise, in P.C.P v. DaCosta¹¹⁸ the plaintiff, when 17, was subjected to abuse that might more aptly be described as sexual harassment rather than sexual abuse. He was subjected to frequent sexual innuendos and genitals through his clothing by his employer during a summer position. During the year following the abuse the plaintiff failed his course towards a B.A. He argued that he intended to go to law school when he

¹¹⁵ Ibid. at 54.

¹¹⁶ Ibid. at 99.

¹¹⁷ Ibid. at 104.

¹¹⁸ Supra note 97.

completed his B.A and that the failure of his courses meant that he would graduate with his law degree a year later than if the abuse had not occurred. The psychiatrist attributed the plaintiffs failure at college to "anxiety, agitation and irritability"¹¹⁹ that intruded into his ability to concentrate. The plaintiff was awarded \$47,000 for future loss of earnings on the basis that he might graduate with a law degree. In discussing the award there was no consideration as to whether or not there was a future loss of earnings. Instead, MacDonald J. pondered over whether the award should be based on graduation with an LL.B. or a B.A. Although conceding "there are many hurdles between the plaintiff and a law degree"¹²⁰ the judge decided that his current academic record and his stated intentions made law school a "substantial possibility" which ought to be reflected in the award for future loss.

However, it is important to note that "maleness" was not the only factor in the weighting of the two plaintiffs aspirations. In both of these cases the plaintiffs submitted claims from a position where they were functioning reasonably well in the public sphere. In P.C.P v. DaCosta¹²¹ where the abuse and its effects were significantly less severe than in other cases, the judge used his current performance at

¹¹⁹ Ibid. at 7.

¹²⁰ Ibid. at 11.

¹²¹ Supra note 99.

university, where he was achieving a B+ average, as a marker of his potential to earn in the future. In Slinn v. Morgan,¹²² although the abuse and its effects were more severe, the plaintiff had entered the workplace and maintained a paid job since leaving school. The judge relied on this as evidence that he might have been more successful in the public sphere.

In a telling contrast, in the only other case where a male plaintiff submitted a claim for loss of earnings, but had his claim refused, the only unachieved aspiration he described was a desire to have a "traditional family life" of his own.¹²³ In that case, the plaintiff was subjected to frequent anal and oral intercourse between the ages of seven and 15 and suffered devastating effects. He left school at 11 to work in the local fish factory in the small town of Chance Cove where he was born and continued to work there. Although Osborn J. explicitly agreed that the abuse had been devastating to the plaintiff eroding his self image, his ability to work, to relax and to learn, paradoxically his low level of achievement provided the evidence of a lack of potential. His claim for loss of earnings was refused because the judge was not convinced "that his education and extent of his employment history were causally related to the abuse."¹²⁴ The judge

¹²² Supra note 97.

¹²³ D.C v. K.C., supra note 100 at 11.

¹²⁴ Ibid. at 12.

concluded that with or without the abuse the plaintiff would have pursued a similar educational and working path. Osborn J. appears to be engaging an ideology based on class differentiation to predict that the plaintiff did not sustain a loss of earnings.

The sharply contrasting positions of the two sets of cases illustrate the differing perceptions of judges as to the reality of men and women achieving the goals and aspirations which they entertain. Judges showed a willingness to endorse the "public" and professional class aspirations of male plaintiffs, but an apparent reluctance to accept similar goals by women plaintiffs. It is equally clear that the confidence with which the two successful male plaintiffs outlined their aspirations, presumably with the support and encouragement of their lawyers, was a persuasive influence on the judges.

Paradoxically the failure of severely injured survivors to achieve in the market sphere is taken as evidence that they would not have done so. By contrast, a degree of functioning in that realm provides the evidence that such plaintiffs could have achieved their aspirations, but for the abuse. Thus, incredibly plaintiffs who suffer less serious effects and who are actually functional in the marketplace become more likely to receive an award, limiting compensation to those already economically independent. Older plaintiffs are likely to suffer less serious effects as they have already passed

through the important formative years of childhood. In DaCosta¹²⁵ the abuse occurred when the plaintiff was 17 years old. In Slinn¹²⁶ the abuse mostly occurred during the plaintiff's teens.

The negation of women's aspirations by judges and expert witnesses contributes to the creation of a conceptual barrier between the familial "private" location of the abuse and the "public" work based location of the claim. Judges are tacitly engaging in the regulation of women's access to financial resources, given that most resources are situated in the public realm of the market. The reality that many women are not financially independent because of the continuing predominance of a sexual division of labour, conceals the issue that this is, at least to some degree, a "choice" that has been taken from them.

The end result is that women survivors, often dysfunctional and unable to engage in paid work, perpetuate as their reality economic dependence either on the state or a male partner.

The "Differing" Effects of Educational Setbacks

As well as devaluing the career aspirations of many plaintiffs there was a connected consistent negation of the educational setbacks which were reported by every plaintiff as

¹²⁵ Supra note 99.

¹²⁶ Supra note 97.

an adverse effect of the abuse. In many of the cases the abuse began at a young age and continued through until early adulthood, important formative years for schooling and education. Indeed, in over half the cases the survivors did not complete high school and four did not complete Grade 8.¹²⁷ Only three had undertaken any tertiary training. Although judges consistently accepted such setbacks as genuine effects of the abuse the actual impact that this might have on a survivor's capacity to earn was greatly understated. Moreover, they showed a particular reluctance to recognize any such impact in the cases where the plaintiffs were women.

In every case the plaintiff detailed how the abuse hindered her or his progress through the education system. They described fatigue, low self esteem, lack of confidence, an inability to concentrate, eating disorders, substance abuse and numerous other factors which resulted in a drop in grades to complete failure. In some cases this was referred to briefly and in others it was detailed in great depth.

In K.D v. D.S.¹²⁸ the plaintiff testified that she frequently slept during school hours, suffered genital pain at school, could not concentrate due to tiredness, and would frequently make herself sick so that she did not have to

¹²⁷ These are high percentages considering that three out of four Canadians do complete high school. Ontario, Children and Youth: An Overview, (Ottawa: Statistics Canada, August 1994).

¹²⁸ [1994] N.J. No. 371 (S.C.) (QL).

attend school. Woolridge J. recognised that her:

Unsatisfactory schooling left her with a deficiency in spelling and writing, and she has always had a fear of strangers and an inability to deal with adult strangers, particularly males on a face to face basis. These panic attacks have had an adverse effect on a bookkeeping course she attempted at a local trade school.¹²⁹

In B.O. v. E.T.¹³⁰ the plaintiff described how as a school child in grade school she had suffered from substantial feelings of unworthiness, refrained from friendships. She became in high school promiscuous, rebellious, and suffered from great anxieties.

In C.M.K. v. Young¹³¹ the plaintiff was abused by her teacher in the classroom and in his office during the school time 2 or 3 times a week, when she was in Grade 4. At the end of the year, despite promising to "fix" her report, he failed her and she had to repeat the grade. It is not surprising that the plaintiff did not do well at school.

Similarly in Colquhoun v. Colquhoun¹³² the plaintiff described educational setbacks as a major effect of the abuse. She suffered throughout her school years from bulimia, migraines, nightmares, depression, insomnia, disassociation, multiple (13) personalities and had attempted suicide in Grade 13. She sought \$107,848 in past lost earnings supported by

¹²⁹ Ibid. at 13.

¹³⁰ [1994] Y.J. No. 14 (QL).

¹³¹ [1994] B.C.J. No. 2792 (QL).

¹³² [1994] O.J. No. 681 (QL).

evidence from Statistics Canada, her own income records and extensive evidence as to her unattained potential. She made a claim for future loss of earnings but did not bring into the process actuarial or economic experts.¹³³ She also submitted a specific claim for tuition fees to enable her to re-educate herself which she supported with the testimony of her school counsellor. The counsellor testified that at school the plaintiff was a successful and popular scholar and athlete whom she expected to go to university. The judge refused the claim for past loss of earnings but had no difficulty accepting that she had lost an opportunity to educate herself further and stated "the plaintiff had the ability to pursue higher education and was motivated to achieve academic success but was unable to continue at a community college as a result of the bulimia nervosa. I allow \$12,000 to gain further education to effect re-entry into the workplace."¹³⁴

The outcome is interesting as is the claim for tuition fees. The claim did not challenge the judge's preconceived assumptions about women and their role within the family, which he aptly illustrated when he described the plaintiff as

¹³³ Many of the lawyers with whom I spoke indicated that the cost of employing actuarial expert witnesses outweighed the probability of a successful claim. In the absence of such evidence judges are supposed to rely either on precedent or on their own perception of the economic market in assessing the award. However, the tendency of judges to reject claims not supported by expert evidence intensifies the problem by entrenching the denial of such claims in the case law which judges may then legitimately rely upon.

¹³⁴ Ibid. at 83.

a "beautiful, intelligent, gentle 29 year old who is a single mother living on benefits." His description identified and constructed her as a mother and dependent on the state. Her qualities - beauty, gentleness and intelligence - are in line with those supposed to emanate from the family sphere. As mother, and an intelligent being, she could pursue courses and still maintain her proper role in a family context. However, such a conceptualization creates an image of her as ill equipped to enter the competitive world of the market. The outcome does not reflect a serious assessment of the loss the plaintiff has suffered. The judge accepts that the abuse caused the effects suffered by the plaintiff, and indeed that the effects affected her capacity to obtain the education for which she was potentially capable. However, he did not, nor did he need to, seriously reconceptualize her in a situation beyond the confines of the family and in the broader public sphere of work. Thus, her position, as statistically one of the poorest people in Canada was maintained.¹³⁵

By contrast in Slinn v. Morgan,¹³⁶ the focus in both the expert testimony and the testimony of the plaintiff was on the male plaintiff's failed education and career prospects. All other effects were secondary or causative of the major effect which was his unattained potential to advance successfully

¹³⁵ In 1994, 60 per cent of lone mothers were below the Low Income Cutoff set by Statistics Canada, supra note 46.

¹³⁶ Supra note 95.

through the academic and educational ladder. Each effect is tied explicitly to his failure to succeed in his educational and career moves. He related his inability to learn in the classroom on his tendency to relapse into a dream world at school. He related his failure to succeed in school examinations to his fear of failure. He related his failure to complete school assignments on his tendency to procrastination. All of these effects - fear of failure, procrastination, and a tendency to dream - were supported and outlined by the expert psychiatrist as effects of the abuse. After leaving school, and after some failed attempts at tertiary education the plaintiff has worked until the trial in jewellery stores as a clerk. He described how this work did not fulfil his potential abilities but provided him instead with a safe and comfortable environment. The evidence of the expert witnesses and the plaintiff himself reflected their shared perceptions that the primary effect on the plaintiff was the interference to his education and the subsequent impact upon his employment prospects.

Education is an important facet in the process of training potential workers to acquire the necessary attributes to function successfully in the paid workforce. The Canadian education system is predicated on a system of aggregation whereby each level of schooling equips and qualifies young persons to proceed through the system. Successful primary schooling facilitates successful secondary schooling which in

turn facilitates acceptance at university or other tertiary level. Failure at any level has inevitable consequences on the ability of a person to gain qualifications that are closely linked to the employability and income level of any given person.

The connection between educational qualifications and potential income levels is succinctly and definitively illustrated in recent Canadian statistics released in August, 1995.¹³⁷ These figures explicitly show the effect of educational attainment on a person's likelihood of engaging in paid work, and significantly, provide particular statistics in relation to women and the educational level which they have attained. The Report shows that women who worked in 1994 for pay or profit had differing educational backgrounds, 77 per cent of women with a university degree worked for pay or profit; likewise 65 per cent of those with a certificate or diploma from a community college, 60 per-cent of those with some post secondary training, and 57 per cent of high school graduates. However, of women who had attended but had not completed high school only 36 per cent were in paid employment. Even more markedly only a low 17 per cent of those women who had not gone beyond Grade 8 were in paid work.

In the context of such statistics and the significant acknowledged impact of sexual abuse on the education of

¹³⁷ Statistics Canada, Women In Canada: A Statistical Report, Housing, Family and Social Statistics Division, 3d ed. at 89-503.

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children who suffer such abuse it seems remarkable that failed schooling by women survivors has been consistently rejected by judges as an effect which is too remote from the abuse to support a claim for compensation for lost earnings. However, the differing response to the educational underachievement of the two male plaintiffs suggests that education is valued as an important asset for some. Indeed, the differing responses are reflective of continuing familial assumptions about the proper role of women in the family. Unfortunately, the creation of such conceptual barriers between women and the marketplace perpetuates and maintains that perception as reality. For these women survivors whose failed educational attempts inhibits their ability to work, it is either participation in a family form in the role projected within familial ideology, or dependence on the state, that will provide them with the economic support they need.

CONCLUDING REMARKS

Dominant ideologies operate in the child sexual abuse cases to maintain a split between the "public" market and the "private" family and at the same time to promote the differing roles of women and men in each. The ideologically formed nuclear family paradigm is strengthened and consolidated by the discourses of judges and ultimately by the outcomes in the cases. Claims for loss of earnings by women survivors, who are

traditionally dependant on men within nuclear family units, are ideologically opposed to that paradigm. It is hardly surprising therefore, that judges have persistently failed to acknowledge the career aspirations and educational setbacks of women plaintiffs, and seek to place them into a familial context as wife and mother. The failure to award women survivors compensation for their lost capacity to earn, usually the primary compensatory mechanism for personal injury awards, springs from and contributes to the maintenance of the nuclear family paradigm. It is a means by which women's access to financial resources is hindered often leading to an alternative form of dependence whereby survivors, many dysfunctional and unable to command a reasonable wage are forced to turn to the state for support. In or out of the family paradigm the failure to award loss of earnings promotes the economic dependence of women survivors, which is a powerful means of social control. Non-pecuniary compensation for pain and suffering however, awarded to women survivors to compensate them for the "emotional" harm they suffer poses no challenge to the nuclear family paradigm and the economic dependence of women within that context.

While women are left to bear the burden of dependency, at the same time, the allocation of the responsibility of breadwinner to those male plaintiffs who meet the standard of the "good father", which they may or may not adopt, provides them with unhindered access to resources and financial

independence. Despite therefore, liberal notions that the law is reluctant to intervene in the family, it is seen in the child sexual abuse cases to be playing a significant role in the constitution and perpetuation of familial relations, which are also patriarchal.

CHAPTER SIX

CONCLUSION

Civil suits pursued by survivors of child sexual abuse are inherently limited in their potential to provide comprehensive compensation to a significant number of claimants. Despite the schema adopted in the trilogy whereby pecuniary damages were to provide the major component to personal injury awards, while non-pecuniary awards provided merely an additional amount to relieve suffering, pecuniary compensation for loss of earnings awards has been rarely awarded to survivors of child sexual abuse. Even when it has, with the exception of the two plaintiffs who provided exemplary examples of Naffine's "abstract man of law", the standard principles of damage assessment were not employed and the quantum of award was low.

In this thesis I set out to examine the reluctance of judges to award loss of earnings compensation to child sexual abuse survivors. I sought to explore doctrinal assumptions and conceptual structures within tort law itself, and then to situate that analysis within the broader social context of which it is part. My goal was to contribute to an assessment of the potential of the civil suit as a strategy for child sexual abuse survivors so that they might achieve compensatory redress for their injuries. My findings were various.

Conceptual devices, historically-replicated within the framework of tort law, have created doctrinal structures which operate to marginalize women's injuries. Although harm emerged in the feudal era as a single concept, it was conceptually separated in the mid-nineteenth century into categories of emotional and physical when women, for the first time, brought actions in the torts of consortium and nervous shock injury. Women's injuries became associated with emotional harm, and emotional harm became associated with women's injuries. At the same time, emotional harm became less compensatable. Predictably then, when child sexual abuse survivors sought redress for their harms in the civil courts their injuries were classified as being non-physical, the effects that flowed from that injury were categorized as being emotional and their claims were placed into, and confined within, the category of non-pecuniary damages. Such damages are limited in quantum by the cap placed upon it in the "trilogy" in 1978. These developments, which have occurred within the framework of tort law, are integral to, and situated within, the wider social context in which the child sexual abuse cases take place. Dominant familial ideologies, present within and beyond the narrow doctrinal context of tort law, operate within the cases to maintain a split between the "public" market and the "private" family, and to shore up and consolidate the ideologically formed nuclear family paradigm. The claims for loss of earnings by women, who are

traditionally situated within that context as dependent wife and mother, are ideologically opposed to that paradigm. It is hardly surprising, therefore, that their claims for loss of earnings are rejected by judges who seek to realign them with their traditional roles. By awarding women survivors non-pecuniary damages, they are compensated for the "emotional" harm they suffer, and the perpetrator is punished for his conduct which led to the disruption of the nuclear family paradigm. Women's access to financial resources is therefore controlled and regulated by adherence to such ideology, and their economic dependence on men or the state is perpetuated. This is a powerful means of social control. By contrast, the traditional role of men within the nuclear family context is as a breadwinner and as economically independent. Therefore, it is also unsurprising that loss of earnings compensation is awarded to such males as meet the standard of the "good father." In this way the ideological model of the nuclear family paradigm, complete with a dependant wife and a breadwinning husband, remains intact.

Incredibly then, in the context of the child sexual abuse cases, a system of award making has emerged which privileges those claimants who have suffered less severe effects and who are more likely to engage effectively in the workforce in the future. By contrast, those claimants whose capacity is most severely curtailed are frequently those who are least likely to receive loss of earnings awards as the gender specific and

"private" familial location and the debilitating nature of the injury often produces those very characteristics which, in turn, preclude recovery.

In the end what remains is a system of decision-making in which a discernable pattern of discrimination can be identified. It is possible to predict the characteristics of a claimant who is likely to make a successful claim for lost earning capacity. The successful claimant will most often be identifiable by some or all of the following characteristics: male, from a middle-class background, single, abused at an older age, and working and functional at the time of the claim. As each characteristic is removed the "ideal" plaintiff becomes less likely to succeed. The end result is a claimant with little chance of success: a woman, married and/or with children, severely dysfunctional, from a working class background, who was abused in her familial home at an early age, who has little education, and is currently unemployed or engaged in part-time employment. Unfortunately from the point of view of potential claimants, such a description aptly describes the characteristics of most survivors. Indeed, it seems that the particular individual who has been projected in the context of my research as the "ideal" claimant, has a remarkable congruence with the "abstract individual" described by Naffine as the legal person that the law protects, approves of and with whom it is primarily concerned.

The reluctance of judges to award loss of earnings to

most claimants is, in turn, mirrored by the lawyers who represent child sexual abuse survivors. In the "best interests" of their clients, they pursue the avenues most likely to eventuate in a positive result. As it stands, the most promising route to obtain a settlement is by means of a non-pecuniary award for pain and suffering. Lawyers are not likely to pursue a claim for loss of earnings when the outcome is likely to be unfavourable, because of the high costs involved in employing the expert economic and actuarial evidence now required. This is particularly so if the defendant is impecunious as there may appear to be little point paying for expert witnesses when all the defendant's assets will be subsumed within the pain and suffering award.

In the light of my research, the implications of pursuing civil actions within the framework as it currently exists are twofold. The civil suit remains a vehicle whereby survivors can obtain a measure of compensation for some of the harm they have suffered. In fact, claimants often receive substantial pain and suffering awards as it is a means by which judges can express their outrage at the conduct of the father figure and the consequential breakdown of the nuclear family paradigm. However, by pursuing pain and suffering awards, and at the same time by not seriously pursuing loss of earnings claims, lawyers, and the plaintiffs themselves contribute to the creation of precedent which becomes entrenched in the case law and which judges may then "legitimately" rely upon. This

perpetuates, in particular, the division between emotional and physical harm. It reinforces the notion that the harm suffered by sexual abuse survivors is emotional and not material and appropriately confined to the non-pecuniary head of damages. Moreover, the concept of separate spheres of "public" and "private" and dominant familial ideology, which constitute and promote different roles for men and women in both the family and the market, are perpetuated. The pursuit of pain and suffering awards, and the failure to pursue loss of earnings awards therefore further enhances and entrenches the power of the law to define, constitute and reflect familial relations.

However, on the other hand, the pain and suffering award is the main avenue by which survivors can receive some compensation for the devastating injuries they have suffered. By employing the methods which will lead to a successful claim, such as engaging expert witnesses to medicalize and materialize their harm into categories of mental illnesses, they receive at least some of the compensation to which they are clearly entitled.

The potential to "salvage" private litigation as a viable option for child sexual abuse survivors, seems limited. The tort system does however remain the primary mechanism for compensating personal injury in Canada. Two possibilities emerge for re-framing litigation approaches so as to facilitate more substantial results. First, lawyers could construct arguments which do not conflict with dominant

ideologies but instead extend the contextual framework in which compensation is currently awarded. For example, in one case a lawyer successfully submitted a claim for tuition fees to enable her client to re-educate herself. This was readily accepted by the judge as compensatable within the scope of the head of damages for loss of earnings. It did not require the judge to conceptualize the plaintiff in the workforce or even beyond her traditional role in the nuclear family paradigm. Although this route may be the most effective for gaining more compensation for individual claimants, unfortunately, the use of such measures reinforces and perpetuates the dominant ideologies which have reduced the compensatability of such claims in the first place.

The second possibility, in contrast to the first, is to construct arguments that challenge the conceptual structures established within the framework of tort law, and at the same time challenge the dominant ideologies which have informed the development of these structures. For example, an argument could be constructed to identify the sexual injury itself as physical and resist the classification of the effects of the abuse as emotional rather than physical. A submission could draw in, and argue as analogous, cases such as the whiplash examples, where plaintiffs suffer similar effects but where compensation for loss of earnings is readily awarded. However, a decade of case law already entrenches the concept that the effects of sexual injuries are emotional, and a century of

case law reflects a conceptualization of women's harms as emotional. Moreover, the relationship between dominant familial ideology and the classification of the harm as emotional, as illustrated in my research, suggests that the discrimination is rooted beyond the framework of tort law. This approach, therefore, is likely to be ineffective.

Alternatives to the pursuance of private litigation by individual claimants so as to receive compensatory redress for their injuries are not readily apparent. Many of the larger group claims publicized in the media, where negotiated deals have proceeded outside the formal court process, have involved a group of individuals pursuing action against institutions (often the church) which can afford a settlement and have an interest in keeping out of the courts. Such institutions are placed in a position similar to a non-offending parent whereby the settlement offers an apology, but does not accept any personal responsibility for the abuse. By contrast, many perpetrators in private litigation insist on their innocence throughout the procedure.

Likewise, the option of law reform seems to have limited potential. The principles of damage assessment, although imbued with gender biases as indicated in other research, constitute a workable mechanism which could, if employed, provide survivors with a measure of earnings related compensation. Judges do not, however, employ those principles in respect of the claims for loss of earnings by child sexual

abuse survivors. There seems little point, therefore, in making new law, when the old law, although problematic, is not being adopted. Again, the failure to apply the principles in the trilogy to the claims of child sexual abuse survivors, graphically illustrates that the problem is not merely situated within the law itself. Indeed, the prominence of dominant familial ideology within the cases, posited in my analysis as an explanatory factor in the scarcity and lowness of awards, suggests that the problem lies not simply within the legal framework but also beyond it in the societal context of which tort law is part. There is no compelling reason, therefore, to conclude that other alternatives would "escape" the implications of such ideological forces.

More questions than solutions stem from my research. Why has there been a surge of civil litigation over the past decade? If the civil system is inherently limited as a means to adequately compensate sexual abuse survivors, what are the alternatives? What are, in fact, the needs and goals of survivors? Is monetary compensation an appropriate means of redress? Although my research proceeded on the basis that significant monetary compensation was a likely and worthwhile goal for many claimants, this remains to date an undetermined issue. The answer to this question, which lies with the survivors themselves, may help determine which strategies are the most appropriate for the future. If monetary compensation is not a primary goal of many survivors then the limitations

imbued within and beyond tort law processes may not be the primary concern. If it is however, then strategizing toward more effective routes is crucial.

APPENDIX A

Dear.....,

I am currently undertaking my Masters degree in law at Carleton University in Ottawa. My supervisor is Professor Brettel Dawson, Chair of the Department (788-2600 ex. 3690). My research focuses on damage awards for survivors of child sexual abuse and, in particular, awards for lost capacity to earn. As part of my research I wish to contact lawyers involved in claims on behalf of survivors in order to develop an understanding of the issues involved in submitting such claims. I note that you represented the plaintiff in..... It would greatly assist my research to receive information concerning the following issue: Was a claim for past or future loss of earnings submitted? If it was, what type of evidence was submitted to support the claim? If no claim was submitted, what were the reasons for not pursuing such a claim? Lastly what are your views as to the appropriateness of making claims, and indeed the awards made in the cases to date, for loss of earnings awards in instances of child sexual abuse? I would greatly appreciate your assistance and time to provide me with the information requested. I recognize that there may be issues of confidentiality and assure that any information will be treated accordingly. No identifying material will be included in my thesis. I can be reached at the address below. I also will be following up by phone within the next few weeks.

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