Civil Remedies for Sexual Assault

A Report prepared for the British Columbia Law Institute by its Project Committee on Civil Remedies for Sexual Assault

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The British Columbia Law Institute was created in 1997 by incorporation under the Provincial *Society Act*. Its mission is to:

(a) promote the clarification and simplification of the law and its adaptation to modern social needs,
(b) promote improvement of the administration of justice and respect for the rule of law, and
(c) promote and carry out scholarly legal research.

The Institute is the effective successor to the Law Reform Commission of British Columbia which ceased operations in 1997.

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Introductory Note

The British Columbia Law Institute has the honour to present:

Report on Civil Remedies for Sexual Assault

This report addresses the way in which civil damages are assessed and awarded to the victims of sexual assault. It was carried forward on behalf of the British Columbia Law Institute by a special Project Committee whose members were appointed by the Board to reflect various professional perspectives and experience in relation to this troubled area of the law. The Committee members carried out a thorough review and analysis of the jurisprudence and the larger legal framework within which the claims of victims are asserted. The Committee also consulted widely with interested persons and groups.

The Committee has brought forward over 30 recommendations on this topic. Since most of the law in this area arises out of decided cases, the majority of the recommendations are directed to the courts. They urge that, subject to the recognized limits on judicial "law-making," future decisions touching on particular issues should develop in ways that reflect the Committee's analysis. Other recommendations are directed to the Provincial Government and Legislature and to other bodies for action within their particular spheres of competence.

The excellence of the Report lies in its summary of this very complex area of the law and of the fundamental underlying issues, as well as collecting together a full analysis of the authorities. The Board unanimously commends the Committee's work as a valuable resource for those who must deal with these issues on a regular basis.

We would like to thank the members of the Project Committee, and in particular its Chair, Professor John McLaren, for the time and energy they have devoted to this task.

June 28, 2001

Gregory K. Steele
Chair, British Columbia Law Institute

EXECUTIVE SUMMARY

Civil actions for damages are one means by which survivors may seek redress after they have been sexually assaulted. Other remedies available include criminal proceedings, criminal injuries compensation, human rights complaints, negotiated or unilateral compensation packages, and public and private inquiries. Actions for damages are a particularly significant means of pursuing redress in this context, as the civil justice system is playing a leading role in establishing how our society will compensate claims of sexual assault, in framing the issues, in developing compensatory principles, and in influencing other procedures for dealing with sexual assault.

The Project Committee on Civil Remedies for Sexual Assault ("the Committee") analyzed developments in the civil law of sexual assault over a three year period from 1998 - 2001. A Working Paper was released by the Institute in June 1999, and was subject to commentary by legal professionals, academics, government officials, and participants at a forum on women's equality rights. Additionally, the Committee held a consultation session in Vancouver in January of 2000, attended by rape crisis and shelter workers, advocates for Aboriginal and Deaf survivors of sexual assault, representatives of centres working on behalf of women and girls, and a psychologist.

This report analyzes the legislative context and judicial decisions pertaining to civil sexual assault law. Our focus is on claims in which the plaintiff has been successful in proving liability against the defendant(s). While liability issues are identified and explored, our recommendations focus on the development and reform of the law of damages, and related issues of representation, procedure, and recovery. Recommendations are directed at the judiciary and judicial bodies, the BC legislature, members of the legal profession, the Law Society of BC, law schools, continuing legal education organizations, and public service organizations, and are designed to meet the needs of plaintiffs, defendants, and society.

Principles

The principles underlying the report are as follows.

1. Sexual assault is a serious matter, resulting in inherent harm to survivors. This harm has not yet been fully recognized by the civil justice system.

2. The civil justice system, while not perfect, is an important process for recognizing the serious nature of sexual assault, awarding compensation to survivors, changing the behaviour of and deterring defendants, and establishing benchmarks for use in other proceedings.

3. It is a reasonable expectation for survivors of sexual assault to look to the civil courts as a means of redress.

4. While recognizing that no amount of money can provide complete restitution, the general purpose of the civil damages system is to attempt as much as possible to place the plaintiff in the state she or he was in prior to the wrongful conduct. The challenge in sexual assault cases is to recognize and quantify the survivor's inherent harm and consequent injuries into a damage award which reflects that restorative principle.

5. Although sexual assault cases raise some issues which are unique, damage awards for sexual assault should be, as far as possible, in line with awards made in other tort cases.

6. There must be attention to diversity in the circumstances and needs of survivors, and to differing forms of harm which flow from sexual assault.

7. Sexual assault is a practice which is not neutral in terms of the gender, race, culture, class, abilities, age, and sexual identity of survivors. As such, principles of equality must be considered in assessing what is fair in compensating survivors.

Liability Issues

Generally speaking, when a plaintiff sues a defendant for damages in a civil action, the first question is whether there is any basis for finding that the defendant is liable, or responsible for the harms flowing from the sexual assault. There are several bases upon which defendants may be found liable in sexual assault cases, all of which are reviewed in the report.

Perpetrators of sexual assault may be found liable in assault and battery where they intentionally cause harm through physical contact. For example, rape, incest, and child sexual assault would lead to findings of liability in assault and battery on the part of the perpetrator.

In sexual assault cases where a trust relationship existed between the perpetrator and survivor, the perpetrator may also be found liable for breach of fiduciary duty. This form of liability may arise where the sexual assault is committed in the context of relationships such as those between parent and child, priest and parishioner, and doctor and patient. This is an emerging area of sexual assault law, in which there is some difference of judicial opinion as to the principles applicable to liability, and the relationship between common law damages and equitable compensation.

Institutions and individuals other than the perpetrator may also be found liable for breach of fiduciary duty in sexual assault cases. For example, some care-givers have been found liable for breach of fiduciary duty for failing to protect their children from sexual assault. This report examines some of the controversy surrounding this issue, and recommends that third party actions against non-offending care-givers should be disallowed by the courts.

Individuals and institutions may be found liable in negligence where injuries are unintentionally, or carelessly, caused. An action based in negligence will be successful where the defendant breached a duty of care owed to the plaintiff, causing harm to the plaintiff. For example, a child care institution could be held liable for failure to adequately vet or monitor its staff who work closely with the children.

Individuals and institutions may also be found vicariously liable for sexual assault in some circumstances. Normally, this doctrine is applied to employers, who may be held liable for wrongs committed by their employees in the course of employment where there is found to be a sufficient connection between the duties of the employee and the sexual assault. For example, sexual assaults by some employees in residential child care facilities may give rise to a finding of vicarious liability on the part of employers. Similarly, under the doctrine of non-delegable duty, governments may be found liable where they delegate child care responsibilities to independent contractors who are in turn found to be responsible for sexual assaults.

Finally, state actors may be liable for sexual assault where they unjustifiably breach a plaintiff's rights under the *Canadian Charter of Rights and Freedoms*. For example, the police may be in breach of their duties under the *Charter* where they use stereotypical views of women to justify their failure to warn women about sexual assault in high risk situations.

In a given sexual assault case, a plaintiff may sue more than one defendant, and on one or more bases of liability. Normally, the defendants' liability will be "joint and several," meaning that the plaintiff may recover 100% of the damages from any of the defendants, who must then seek contribution from the others.

The doctrine of causation forms the link between liability and damages in civil actions. According to this doctrine, a plaintiff must prove that her injuries would not have occurred but for the conduct of the defendant(s), or that the defendant's conduct contributed to her injuries in a material way. In sexual assault cases, a number of difficult issues arise. There may be other causes of a plaintiff's injuries, both wrongful and innocent, which occurred before, after, or concurrent with the sexual assault(s) in question. This report recommends that in cases where multiple actors have committed sexual assault against a plaintiff, either taking advantage of or increasing the plaintiff's vulnerability to sexual assault, the tortfeasors should be held to have materially contributed to the plaintiff's injuries to their full extent unless they can persuade a court that in the circumstances the elements of the harm are

severable.

Damages Issues

Once liability and causation are established, a plaintiff is entitled to be compensated for the injuries flowing from the sexual assault. Damages may be awarded for pain and suffering (non-pecuniary damages) and economic losses, past and future (pecuniary damages).

Non-pecuniary damages seek to compensate plaintiffs for intangible losses, such as pain and suffering, and loss of amenities. It is difficult to put an exact dollar figure on these types of losses, a difficulty which is exacerbated in cases where the harm is largely psychological.

The law recognizes that sexual assault cannot be committed without harm. The inherent harm of sexual assault is best described as a loss of dignity, personal integrity, autonomy, and personhood. This report concludes that the courts have had difficulty in translating the inherent harm of sexual assault into non-pecuniary damages, and recommends that a conventional award for damages for the inherent harm of sexual assault be established. This award would be available to all plaintiffs upon proof of liability, without need for proof of consequential injuries, and regardless of the basis of the defendant's liability.

In addition to inherent harm, sexual assault may result in consequential injuries to survivors, including difficulties relating to depression, anxiety, mood disorders, disturbances of sleep, eating, sexuality, personality, interpersonal relationships, child development, and learning abilities. Several issues arise in respect of fully compensating survivors for their injuries. First, the cap, or rough upper limit, which applies in personal injury cases to non-pecuniary damage awards has been found by the courts to be inapplicable to sexual assault cases based in assault and battery. This report recommends that this approach be extended to other bases of liability for sexual assault, including negligence, vicarious liability, and breach of non-delegable duty.

At present, the range of non-pecuniary damage awards varies widely in cases of childhood sexual assault and sexual assault against adults. Moreover, the damage awards in sexual assault cases are often not in line with those in other cases involving intentional torts. This report recommends the elucidation of a "benchmark" for both childhood sexual assault and sexual assaults committed against adults, which would set an appropriate conventional award of damages and confirm the factors to be considered in fine tuning the award. We conclude that the defendant's basis of liability should not be the governing factor in assessing non-pecuniary damages in sexual assault cases.

Courts have had particular difficulties in compensating the non-pecuniary losses of survivors who are more vulnerable to, or targeted for, sexual assault because of their age, gender, race, culture, disability, class, sexual orientation, or other personal characteristics. This report recommends that the compounded nature of harm which results in such cases be quantified

as an aspect of aggravated damages. In addition, we recommend the creation and delivery of training programs for judges on the inherent harm and consequential injuries in sexual assault cases, including the diversity of ways in which plaintiffs may present as survivors of sexual assault.

Where a plaintiff's claim is based on a breach of fiduciary duty, principles of equitable compensation will apply. If a plaintiff has already been awarded damages for assault and battery or negligence, we recommend that the breach of fiduciary duty be treated as an aspect of aggravated or punitive damages, given the breach of trust inherent in such claims. Similarly, where a plaintiff's claim is, in part, for breach of the *Charter*, this should be treated as an aspect of aggravated or punitive damages, given the breach by the state of its constitutional obligations.

The report recommends that aggravated damages should be assessed separately from general non-pecuniary damages in sexual assault cases to provide greater precision in an area where multiple defendants are common, and aggravated damages may only be appropriate against some. The conduct of each defendant should be assessed separately, with no absolute bar against aggravated damages where the defendant's conduct amounts to an unintentional tort.

Punitive damages may also be awarded in sexual assault cases to punish the defendant and deter others from similar conduct. The report reviews the factors used by the courts to assess the propriety of awarding punitive damages. We recommend that the courts continue to adopt a flexible approach in assessing whether punitive damages are appropriate in cases where there have been criminal sanctions. Moreover, we conclude that the quanta of punitive damage awards in sexual assault cases tends to be low, and recommend that where the defendant's conduct is found to be deserving of an award of punitive damages, the amount of the award should be one which will serve as an effective deterrent and that is in line with awards made in other types of cases.

Pecuniary damages are awarded for economic losses, and seek to place plaintiffs in the same position they would have been in if they had not been injured. Pecuniary damages are sub-divided into several categories. Special damages are awarded to cover a plaintiff's pre-trial expenses in treating her injuries, and her lost wages. Pecuniary damages may also be awarded for the future costs of caring for injuries, and for future loss of earnings.

In early sexual assault decisions, courts often declined to make pecuniary damage awards. This trend has diminished somewhat as the economic consequences of sexual assault have begun to be better appreciated. A persisting issue relates to the use of statistical female earnings tables and gender biased contingencies to calculate future loss of earning capacity for female plaintiffs. While this is a concern in all personal injury cases, it is particularly prevalent in sexual assault cases, as the majority of survivors are female. Similar problems have been identified with racialized statistics. The report recommends that lawyers and

courts continue to develop and apply approaches to the use of statistical earnings tables and contingencies for loss of future earnings that avoid perpetuating bias on the basis of gender, race, culture, class, ability, and other forms of disadvantage. We also conclude that while pecuniary damages for the loss of homemaking capacity and family income may be available in theory, they are not often awarded in sexual assault cases. We recommend that in appropriate sexual assault cases, courts award damages under these heads without reductions for gender-based contingencies.

In addition to survivors of sexual assault, injuries may also be experienced by secondary victims, especially family members. In particular, Aboriginal peoples have noted how the treatment of their children at residential schools affected survivors, as well as their families and communities. Currently, the common law is restrictive in its approach to damages for secondary victims, confining damages to the category of nervous shock. Moreover, BC's *Family Compensation Act* restricts actions by secondary victims to circumstances where the primary victim has died. We recommend that the *Act* be amended to permit secondary victims of sexual assault, broadly defined, to seek compensation, and that courts interpret the principles at play in these cases in favour of awarding damages to secondary victims in appropriate cases.

Representation, Procedure, and Recovery Issues

Civil actions for sexual assault are costly to mount. Our consultations revealed that survivors may have difficulties finding lawyers willing to take on their cases, regardless of the fact that contingency fees are available and disbursements may be covered. This relates to the fact that often the quantum of damages a potential plaintiff can expect to receive is low, and many lawyers are thereby dissuaded from taking on these cases. Conversely, some lawyers may take on sexual assault cases without sufficient expertise or knowledge of the unique features of such cases, and may actively recruit clients. The report recommends that continuing legal education initiatives in the area of civil sexual assault be continued and strengthened, and that the Law Society of BC amend its *Professional Conduct Handbook* to restrict recruitment of and directed advertising to survivors of sexual assault.

In a successful lawsuit, a plaintiff may be awarded the costs of her action on a number of different levels. In sexual assault cases, one issue is whether there is scope for the increased availability of "special" costs to ensure that survivors are fully compensated, and that perpetrators of intentional conduct are held liable for the full extent of the costs. The report recommends that courts take into account the unique factors which may come into play in sexual assault cases, and award special costs in appropriate cases.

Several issues arise with respect to the civil trial process itself. The Committee's Working Paper identified issues relating to the use of jury trials for civil sexual assault actions, but received little feedback on these issues. Conversely, while we did not identify issues relating to the privacy interests of survivors, some commentators expressed their views on this matter. The report recommends further study of the use of jury trials for civil sexual assault actions in BC, and of issues relating to the privacy and access to information interests of plaintiffs in such actions.

Another procedural matter arising in sexual assault cases is the availability of pre-judgment interest. In 1993, the BC government enacted section 2(e) of the *Court Order Interest Act*, which abolished pre-judgment interest on non-pecuniary damage awards in all personal injury cases. This amendment may be particularly harsh for survivors of sexual assault, as it may deprive them of the benefit of several years of interest on an award, accounting for the number of years they lived with the effects of the abuse. The report recommends that section 2(e) of the *Court Order Interest Act* be repealed, and makes recommendations regarding the timing of interest calculations should pre-judgement interest once again be available.

Once a plaintiff is successful in a lawsuit, the final step is to execute the judgment and collect damages. Currently, pre-judgment remedies, which allow a plaintiff to secure a defendant's assets prior to trial, are available in limited circumstances in sexual assault cases. The report reiterates the earlier recommendation of the Law Reform Commission of BC that the *Court Order Enforcement Act* be amended to make pre-judgment garnishment available to plaintiffs in sexual assault actions, and to permit plaintiffs to register a "notice of action" against land owned by the defendant(s).

Another area of interest in sexual assault cases relates to the availability of insurance to cover the defendant(s)' liability for any award of damages made. A number of matters arise in this context, pertaining to both general policy issues and specific issues of coverage. The report concludes that insurance coverage for sexual assault is a positive development, and recommends that standard coverage and limits for negligence and vicarious liability be mandated for all institutions providing care to children and other vulnerable groups in British Columbia.

Finally, the report looks briefly at the interplay between civil actions for sexual assault and the criminal injuries compensation system. We conclude that the government should maintain and expand its commitment to the criminal injuries compensation system by considering limitations and process issues, the level and criteria for awards, and the training of personnel.

A Summary of Recommendations is included in the final section of the Report.

Part I. Introduction

A. The Committee's Mandate from the British Columbia Law Institute

The British Columbia Law Institute ("the Institute") was created in 1997 as the successor to the Law Reform Commission of British Columbia. The Institute is an independent, non-profit organization. In August 1997, the Institute formed the Project Committee on Civil Remedies for Sexual Assault ("the Committee"). The Committee's mandate has been to conduct research, consultations, and legal analysis in the area of civil remedies for sexual assault.

B. The Reasons for the Study

As noted in the Committee's Working Paper on Civil Remedies for Sexual Assault ("the Working Paper"),[1] a study on civil remedies for sexual assault is important for a number of reasons. First, civil actions for damages for sexual assault are a fairly new legal response to dealing with a much older societal problem. Given the novel nature of these claims, there has been little existing guidance for the courts on the factors and considerations which are relevant to making assessments of damages. Second, while alternatives to the civil justice system are now being explored, there is a need for benchmarks relating to damages to ensure that the harms of sexual assault are fairly compensated. The civil justice system is well positioned to play a leading role in establishing how our society should compensate claims of sexual assault, and in framing and influencing other procedures for dealing with these claims.

C. The Committee's Process of Research and Consultation

The Committee is composed of members of the legal and psychiatric professions and legal academics with expertise in sexual assault cases. In February 1999, the Committee released a draft working paper for preliminary consultations with legal professionals and organizations working with survivors of sexual assault. After obtaining feedback from these preliminary consultations, a finalized Working Paper was released by the Institute in June 1999. The Working Paper analyzed the application of legal principles in civil sexual assault cases, and raised several issues for discussion. The public was invited to comment on these and other issues. Comments were received from legal professionals, academics, government officials, and participants at a forum on women's equality rights.

1. Project Committee on Civil Remedies for Sexual Assault, *Civil Remedies for Sexual Assault: A Working Paper* (Vancouver: BC Law Institute, 1999). The Working Paper is also accessible on the BCLI website, http://www.bcli.org.

In response to our concerns about the low response rate from groups working with survivors of sexual assault, the Committee held a consultation session in Vancouver in January of 2000. Over 30 individuals were invited to discuss issues arising when survivors seek compensation for sexual assault. The consultation session was attended by rape crisis and shelter workers, advocates for Aboriginal and Deaf survivors of sexual assault, representatives of centres working on behalf of women and girls, and a psychologist.

D. The Purpose and Scope of the Study

This Report is the final stage in the Committee's study. Based on the Committee's legal analysis and consultations, the Report makes suggestions and recommendations for the development and reform of the law in this area. Recommendations are directed at the judiciary and judicial bodies, the BC legislature, members of the legal profession, the Law Society of BC, law schools, continuing legal education organizations, and public service organizations. Our focus is on the law of British Columbia, but many of these recommendations could be implemented in other jurisdictions as well.

It is also hoped that the Report will assist in the important process of informing the public about the operation of the law in civil sexual assault cases, and will assist front line workers in their advocacy on behalf of survivors.[2]

One of our challenges here is to use language that will speak to the multiple audiences to which this Report is directed. We include a glossary of terms to assist those readers who are not familiar with some of the legal terms used in the Report.

2. The term "survivor" will be used in this report to refer to persons who have been sexually assaulted. In the Committee's view, this term is preferable to the word "victim," which may suggest a level of helplessness that fails to acknowledge the inner strength of those who have been sexually assaulted. The term "survivor" is also appropriate in light of our focus on compensation issues for those who have proved liability for sexual assault against the defendant(s). Alternatively, we employ the term "plaintiff" to describe someone who has commenced a civil action for damages for sexual assault.

Part II. The Contextual Background of Sexual Assault Claims

A. The Historical and Social Context

Sexual offences have been prohibited in various forms under the criminal law since before Confederation.[3] Moreover, child protection laws, which developed from the late 19th century in Canada, have reflected in part a concern about the actual or anticipated sexual abuse of children. Historically, civil actions for damages for sexual assault have been available in theory, but only relatively recently have they been used as a means of obtaining redress.

For many years, social attitudes and assumptions worked against the effective use of the law, both criminal and civil. In criminal cases, the courts often focused on the reputation and character of the complainant, making convictions for sexual offences rare. Moreover, legislatures and law enforcement authorities largely ignored wrongful conduct occurring within the "private," family sphere. Institutions and organizations which cared for children were also largely free from investigation and prosecution by the state, although sexual assault and other forms of abuse clearly occurred in these settings. When sexual assault or abuse was uncovered, it was often seen as the result of the individual perpetrator's deviant behaviour rather than a matter of institutional or state responsibility.[4]

More recently, social investigation and critique and the establishment of survivor support groups have created a climate which has assisted many survivors in coming forward with their stories of abuse. In turn, this has increasingly exposed the hidden dimensions of sexual assault. Sexual assault is now recognized more readily as an act of violence, power, and control. Pressure has developed for the justice system to take sexual assault seriously, and for the law to effectively prosecute, convict, and punish offenders, and to provide compensation for survivors of sexual assault. Many of the legal barriers which accompanied, or flowed from, earlier social attitudes regarding sexual assault have been and are being challenged, resulting in new possibilities for redress in the civil sphere.[5]

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3. For the most recent criminal provisions relating to sexual assault, *see Criminal Code of Canada*, R.S.C. 1985, c. C-46, ss. 150-159, 271-276 (as amended) [hereinafter *Criminal Code*].

4. *See* Law Commission of Canada, *Minister's Reference on Institutional Child Abuse (Discussion Paper)* (Ottawa: The Commission, 1998) at 17-18.

5. For example, in BC, there is no longer any limitation period for actions based on sexual misconduct. *See Limitation Act,* R.S.B.C. 1996, c. 266, s. 3(4)(k) and (l), originally enacted in 1992. BC's ombudsman has recommended that the Attorney General consider amending the *Limitation Act* to allow victims of all forms of child abuse to bring actions unencumbered by limitation periods. *See* Ombudsman of British Columbia, Public Report No. 38: *Righting the Wrong: The Confinement of the Sons of Freedom Doukhobor Children* (Victoria: Ombudsman, Province of British Columbia, 1999). The Law Commission of Canada made a similar recommendation in relation to institutional child abuse, and recommended that governments refrain from relying on limitation periods to defend claims of institutional abuse. *See* Law Commission of Canada, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions* (Ottawa: The Commission, 2000) at 178 [hereinafter *Restoring Dignity*].

As civil actions for sexual assault have historically been rare, the courts and parties have not had the benefit of many precedents for assessing compensation for the harm of sexual assault, which is primarily emotional and psychological rather than physical. In this developing area of law, courts have relied on the evidence of survivors and experts, precedents from personal injury cases, and the small, but growing, body of previously decided sexual assault cases in attempting to achieve just results.

B. The Reality of Sexual Assault: Definitions, Contexts, and Challenges

Sexual assault can be defined as the intentional application of force which violates a person's sexual integrity, without that person's consent. There is a range of conduct that falls within this definition, from unwanted sexual touching to rape, buggery, and sexual torture. Sexual assault may consist of an isolated incident, or a series of incidents spanning a number of years, and may be accompanied by physical, emotional, spiritual, and cultural abuse.

Judicial decisions and legal and policy studies[6] have noted that sexual assault is a gendered practice in our society - perpetrators are predominantly male, and survivors are predominantly women and children.[7] Individuals who are otherwise marginalized may also be particularly vulnerable to, or specifically targeted for, sexual assault, for example, persons

6. *See R.* v. *Seaboyer*, [1991] 2 S.C.R. 577 at 648 (*per* L'Heureux Dubé, J.); *Osolin* v. *The Queen*, [1993] 4 S.C.R. 595 at 669 (*per* Cory, J.); *M.(A.)* v. *Ryan*, [1997] 1 S.C.R. 309 at para. 30 (*per* McLachlin, J.); *Jane Doe* v. *Metropolitan Toronto (Municipality) Commissioners of Police,* (1998) 160 D.L.R. (4th) 697 at 702; Canadian Panel on Violence Against Women, *Changing the Landscape: Ending Violence: Achieving Equality: Final Report* (Ottawa: The Panel, 1993); Canadian Centre for Justice Statistics, *Family Violence in Canada*: *Canada, Current National Data* (Ottawa: Statistics Canada, 1994); J.V. Roberts, "Sexual Assault in Canada: Recent Statistical Trends" (1996), 21 Queen's L. J. 395 at 402. Children at particular risk of sexual assault are step-daughters, foster children, runaways, and street kids. *See* BC Task Force on Family Violence, *Is Anyone Listening?* (Victoria: Ministry of Women's Equality, 1992) at 183.

7. There has been a move to use gender neutral language in legal writing for some time now. *See* for example BC Law Institute, *Gender-Free Legal Writing: Managing the Personal Pronouns* (Vancouver: BC Law Institute, 1998). In the Committee's view, it is not appropriate to use neutral language to refer to matters which are gendered, such as sexual assault. For this reason, we refer generally to perpetrators as male, to adult victims as female, and to survivors of childhood sexual abuse as male and female. This, we believe, reflects the predominant social reality.

with physical and mental disabilities,[8] Aboriginal women and children,[9] foreign domestic workers,[10] lesbians and gay men,[11] and persons experiencing multiple levels of disadvantage.[12] Thus, in addition to gender and age, inequalities based on race, culture, sexual orientation, (dis)ability, and class may also come into play in the context of sexual assault.

It is also important to note the broad and varied contexts in which sexual violence occurs. Sexual assaults against both adults and children are committed most often by persons known to the survivor. For many children, the greatest risk of sexual assault is found within the immediate, extended, or surrogate family.[13] Several examples of institutional sexual abuse have also come to public attention in the last decade.[14] In the case of children, sexual abuse has been documented in public and private schools, churches, boys' and girls' clubs, sports teams, and other public and private places and institutions.

8. *See* D. Sobsey and C. Varnhagen, *Sexual Abuse and Exploitation of People with Disabilities: A Study of the Victims* (Ottawa: Health Canada, 1990) at 8, 13; BC Task Force on Family Violence at 234-235; Canadian Centre for Justice Statistics, *Family Violence in Canada* at 82.

9. *See* Ontario Native Women's Association, *Breaking Free: A Proposal for Change to Aboriginal Family Violence* (Thunder Bay: The Association, 1989) at 17; *Report of the Royal Commission on Aboriginal Peoples*, vol. 3, at 63-64; E. La Rocque, "Violence in Aboriginal Communities" in Royal Commission on Aboriginal Peoples, *The Path to Healing: Report of the National Roundtable on Aboriginal Health and Social Issues* (Ottawa: Minister of Supply and Services, 1994) at 74.

10. *See* Canadian Panel on Violence Against Women at 90-93. According to the B.C. Task Force on Family Violence at 204, there are many barriers for immigrant and refugee women generally in seeking solutions to sexual violence.

11. *See* Canadian Panel on Violence Against Women at 73; Law Society of British Columbia, *Gender Equality in the Justice System: A Report of the Law Society of British Columbia Gender Bias Committee*, vol. 2 (Vancouver: Law Society of B.C., 1992) at 7-120.

12. *See* Canadian Panel on Violence Against Women at 7; *Report of the Royal Commission on Aboriginal Peoples*, vol. 3 at 56.

13. Canadian Centre for Justice Statistics, *Family Violence in Canada* at 62, 78.

14. *See* Law Commission of Canada, *Restoring Dignity*. *See also* T. R. Berger, *Report of Special Counsel Regarding Claims Arising Out of Sexual Abuse at Jericho Hill School* (Victoria: Queen's Printer, 1995); S.H.S. Hughes, Commissioner, *The Royal Commission of Inquiry into the Response of the Newfoundland Criminal Justice System to Complaints* (St. John's: The Commission, 1992); *Civil Liability for Sexual Assault in an Institutional Setting* (Toronto: Canadian Institute, 1995); *Report of the Royal Commission on Aboriginal Peoples,* vol. 1, *Looking Forward, Looking Back* (Ottawa: The Commission, 1996) at 304-305; First Nations Summit, *Special Chiefs Assembly on Residential Schools* (Squamish, BC, 1996); Alkali Residential School Inquiry Report (unpublished, 1997).

C. Legal Responses to Sexual Assault

There are various processes and remedies available to survivors of sexual assault. Different remedies will be more or less appropriate for different survivors of abuse, depending on what they seek to accomplish, their means, and their willingness to engage with the legal system. These matters may in turn be affected by a survivor's cultural background, age, economic status, sexual identity, and other personal characteristics, as well as by their support networks.

Generally speaking, remedies for sexual assault can be sought via civil actions for damages, criminal charges, criminal injuries compensation, human rights commissions and tribunals, compensation packages, community initiatives, ombudsman or other advocacy offices, and public or private inquiries. As noted, the focus of this report is the civil justice system, and we do not purport to offer a comprehensive review of other remedial options here. We will briefly describe each of these alternatives in turn, with particular reference to their relationship, if any, to the civil justice system. The Law Commission of Canada recently completed a review and analysis of the processes and remedies available to survivors of institutional abuse that will be very useful for readers wishing a broader view.[15]

Civil actions for damages, broadly speaking, comprise lawsuits commenced by plaintiffs against defendants for conduct that is alleged to be wrongful. A civil action for damages can be empowering for survivors of sexual assault, offering them the support of the legal system, relative control over the proceedings, and the possibility of financial compensation.[16] The compensatory aspect of the torts system may also have a deterrent effect, particularly where institutional defendants are educated about improving their procedures for preventing and dealing with sexual assault. A punitive or retributive element may be evident in the law's

15. Law Commission of Canada, *Restoring Dignity*. The Law Commission evaluated these options on the basis of several criteria: respect, engagement and informed choice, fact-finding, accountability, fairness, acknowledgment, apology and reconciliation, compensation, counselling and education, the needs of families, communities and peoples, and prevention and public education. It concluded that redress programs are the best option for meeting these criteria.

16. *See* A.M. Linden, "Torts Tomorrow: Empowering the Injured," in Continuing Legal Education Society of B.C., *Torts - 1998 Update* (Vancouver: C.L.E.S.B.C., 1998); N. West, "Rape in the Criminal Law and the Victim's Tort Alternative: A Feminist Analysis" (1992), 50 U.T. Fac. L. Rev. 96 at 109-111; E. Sheehy, "Compensation for Women Who Have Been Raped" in J.V. Roberts and R.M. Mohr, eds., *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) 205 at 206-207.

response when punitive damages are awarded. Ancillary remedies may also be available, including no-contact orders, and the destruction of physical evidence of the abuse.[17] Procedurally, survivors may litigate as a group,[18] offering the possibility of solidarity and some sharing of costs.

There are also drawbacks to the civil justice system. Civil actions can be costly both financially and emotionally. In this adversarial system, plaintiffs are often required to delve deeply into their past, and to provide disclosure of personal records documenting various aspects of their lives.[19] Where a defendant does not have appreciable assets, the compensatory aspect of a civil suit will be diminished. Others have argued that the torts system has a tendency to individualize systemic wrongs, and to ignore or gloss over group harms.[20]

The traditional aims of the criminal justice system are to deter offenders and others from committing similar offenses in the future, to protect the public, and to denounce the commission of crimes as contrary to the public interest. Criminal charges are laid by the police after a complaint is made, and the Crown then decides whether charges will proceed, and conducts any criminal prosecution. The conduct of the criminal justice process is largely out of the hands of survivors of sexual assault, and continues to be viewed by many as an ordeal.[21] Still, criminal charges are an important means of denouncing and deterring sexual

17. For example, *see Beaudry* v. *Hackett*, [1991] B.C.J. No. 3940. In this case, the B.C. Supreme Court ordered that the defendant have no contact with the plaintiff, and ordered the surrender of photographs and negatives of the plaintiff taken by the defendant.

18. Class actions are governed by BC's *Supreme Court Rules* (B.C. Reg. 221/90), Rule 5(2). For a discussion of a BC case involving an application for a class action, *see infra* n. 28.

19. In *M.(A.)* v. *Ryan,* [1997] 1 S.C.R. 157, a majority of the Supreme Court of Canada held that psychiatrist-patient communications were not entitled to be accorded a class privilege. Rather, the question of whether such relevant communications were privileged, and thus protected from disclosure in a civil trial, is to be determined on a case by case basis, with particular regard to whether the interests served by non-disclosure outweigh the interests of pursuing the truth and the disposition of the litigation (at 179-180 *per* McLachlin, J.).

20. According to Elizabeth Sheehy, "the structures and ideologies that support and reproduce coercive sexuality are hidden by the focus on the individual defendant as rapist." See "Compensation for Women Who Have Been Raped" at 228. Moreover, at 229, "It is the woman herself who bears the personal and financial costs of pursuing compensation. The decision therefore remains a very difficult and personal one for women who have been raped." On the other hand, the option of litigating as a group opens up the possibility of having the courts recognize group harms, and of solidarity.

21. *See* for example M. MacCrimmon, "Trial by Ordeal" (1996), 1 Can. Crim. L. Rev. 31 at 56. It was recently recognized by the Supreme Court of Canada that "[t]he history of the treatment of sexual assault complainants by our society and our legal system is an unfortunate one ... [and] remains an ongoing problem." *See R. v.* Mills, [1999] 3 S.C.R. 668 at para. 58. This is particularly true for some survivors, such as those of Aboriginal descent, and those who are immigrants or refugees, where the proceedings are culturally remote.

offences, and do not preclude civil actions for damages.[22] Where both criminal and civil proceedings are contemplated, criminal charges are normally dealt with first, and may assist a survivor in proving the civil liability of the perpetrator.

Criminal injuries compensation is available in most jurisdictions across Canada to provide survivors of sexual assault (and other crimes) with financial redress. This remedy has the advantage of being relatively informal, and fairly quick to access. However, only modest compensation can be awarded.[23] Survivors who are awarded criminal injuries compensation may also bring civil actions for damages, but the criminal injuries compensation board will be reimbursed out of any damages awarded.[24]

Criminal injuries compensation is perhaps the most closely related remedy to civil actions for damages, as both focus on the compensation of the survivor. Indeed, criminal injuries compensation may be an alternative to pursuing a civil action, particularly where the culpability of the defendant is not in issue, and the plaintiff desires quick recovery. There are several issues which arise in the context of criminal injuries compensation, relating to both the process and the quantum of the compensation available under this system. This report recommends that further study be undertaken on these issues in British Columbia.

Human rights remedies may be available for those who are sexually assaulted in an employment setting, as this type of conduct may amount to discrimination on the basis of sex or other grounds.[25] The main objective of human rights regimes is to eliminate and prevent future discrimination. Human rights tribunals are empowered to order that the discriminatory conduct cease, and award modest compensation to the person discriminated against. Alternatively, parties may agree to a settlement of a human rights claim, including compensation.[26] Like the criminal injuries compensation scheme, human rights remedies

22. Compensation for pecuniary losses relating to bodily harm is also available under the *Criminal Code*; however, the amount of any such compensation will be small. *See Criminal Code,* s. 738.

23. In B.C., *see Criminal Injury Compensation Act,* R.S.B.C. 1996, c. 85. The emphasis in compensation is on financial loss flowing from criminal activity, for example, income replacement, the cost of medical treatment, and expenses flowing from the injury. Non-pecuniary damages for pain and suffering, mental and emotional trauma, humiliation, or inconvenience are available to a maximum of $50,000 (ss. 2(4), 13). Compensation for aggravated and punitive damages is not provided. Normally, a limitation period of one year from the date of the injury applies, but this is routinely waived in cases involving sexual assault. *See* s. 6.

24. *Ibid.*, s. 10. In practice, if a plaintiff is cooperative in re-paying, they may be able to negotiate a pro rata reimbursement which takes into account the legal fees and disbursements they paid.

25. *See Human Rights Code,* R.S.B.C. 1996, c. 210, s. 13; *Janzen* v. *Platy Enterprises,* [1989] 1 S.C.R. 1252. In addition to sex, harassment may involve elements of discrimination based on race, culture, disability, and sexual orientation.

26. *Human Rights Code*, ss. 29, 37(2). Compensation is available for any wages or salary lost, expenses incurred, and for injury to dignity, feelings, and self respect.

have the advantage of being relatively informal and less onerous than either criminal or civil proceedings, but may involve substantial delays. Although there is no tort of discrimination, survivors who are awarded compensation by a human rights tribunal may also bring civil actions for damages under other causes of action such as assault and battery, negligence, vicarious liability, breach of fiduciary obligation, and breach of the *Charter of Rights and Freedoms*.[27]

An alternative to, or possible outcome, of a civil action for damages, is a compensation package, which may be negotiated with or unilaterally provided by the (potential) defendant(s). Negotiated packages allow survivors to participate in the design, content, and delivery of compensation, and may include redress beyond the usual financial awards.[28] Such initiatives also allow survivors to avoid the costs, both monetary and emotional, of lengthy civil proceedings. Alternatively, compensation packages may be provided unilaterally by government or other defendants. Again, this form of redress may include non-financial remedies, and allows survivors to avoid the costs of civil actions for damages.[29] On the other hand, the level of damages awarded under such packages is often lower than a survivor would receive if a civil action were pursued to its conclusion. One of the difficulties with such packages is that their terms are often confidential, thus depriving non-parties of the ability to review the fairness of the outcome.[30]

Some forms of redress are centred within the community. Such initiatives have the advantage

27. Unlike criminal injuries compensation, the amount of compensation paid for a successful human rights complaint does not have to be paid back out of any civil damages award.

28. In Ontario, for example, the Grandview Survivors' Support Group negotiated a "healing package" with the Ontario government in relation to sexual abuse which occurred at a training school for girls from the mid 1960s to 1970s. The healing package consists of group benefits, including therapy, access to a crisis line, and ongoing financial support of the survivors' group, as well as individual benefits, including vocational/educational training and upgrading, residential treatment programs, and individualized compensation for the abuse. *See* S. Vella, "The Healing Package Negotiated by The Grandview Survivors' Support Group: An Example of Alternative Dispute Resolution and Societal Accountability in Action" in *Civil Liability for Sexual Assault in an Institutional Setting* at 8-9.

29. For example, in BC, the provincial government has offered compensation to survivors of sexual abuse at the Jericho Hill School for the Deaf upon the recommendations of Thomas Berger, special counsel appointed to report on claims arising from the abuse. The maximum award of damages is $60,000 for "serious and prolonged abuse." Also available under the scheme is compensation for the Deaf community more broadly. *See* Berger at 22-28, 31-32. Although some former students have availed themselves of compensation under this scheme, thus giving up their right to sue for damages, others have commenced or continued with civil actions against the province. An application for a class action on behalf of Jericho Hill survivors of sexual abuse was granted by the BC Court of Appeal. *See R.(L.)* v. *British Columbia*, (1999) 72 B.C.L.R. (3d) 1 (B.C.C.A.). The Government has filed an application for leave to appeal this decision to the Supreme Court of Canada. *See* [2000] S.C.C.A. No. 20 (Q.L.).

30. *See* Law Commission of Canada, *Restoring Dignity* at 158. The Commission recommended that "[g]overnments should not impose confidentiality provisions on settlements with survivors of institutional child abuse, or on awards granted pursuant to any alternative dispute resolution process" (at 179).

of responding most directly to the needs of the community, and normally focus on non-financial redress. To date, most of these initiatives have taken place within Aboriginal communities. For example, in Manitoba, the Hollow Water First Nation began a Community Holistic Circle Healing Program in 1987 after a number of individuals disclosed sexual abuse at a community workshop. The program includes a resource group which meets and holds ceremonies with the survivor, perpetrator, their families, and other community members in order to advance the healing process.[31] In 1998, the federal government provided a $350 million fund to support community healing initiatives for Aboriginal peoples in relation to residential school abuse.[32] These types of initiatives do not rule out a civil action for damages for sexual assault.

Some provinces, including BC, have an ombudsman, who may investigate government action and make recommendations for change.[33] An ombudsman is an independent and impartial official who is empowered to act on the basis of individual complaints, at the ombudsman's own behest, or on matters referred by the government. Ombudsmen have in the past investigated government involvement in sexual abuse and similar matters, and have recommended that culpable government action or inaction be rectified via compensation.[34] However, there is no mechanism for enforcing such a recommendation, other than the government's good will. An investigation by an ombudsman does not preclude the commencement of a civil action for damages by a survivor of sexual assault.

31. *See* Public Inquiry into the Administration of Justice and Aboriginal Peoples, *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: The Inquiry, 1991) at 493-495. For a discussion of community initiatives in the context of institutional abuse, *see* Law Commission of Canada, *Restoring Dignity* at 283 - 301.

32. *See* Minister of Indian Affairs, *The Path to Healing* (Ottawa: The Ministry of Indian Affairs, 1998) at 1.

33. In BC, *see* the *Ombudsman Act*, R.S.B.C. 1996, c. 340.

34. In BC, *see* Ombudsman of British Columbia, *Public Report No. 32: Abuse of Deaf Students at Jericho Hill School* (Victoria: B.C. Ombudsman, 1993); Ombudsman of British Columbia, *Public Report No. 38: Righting the Wrong.*

Sexual assault has also been the subject of public and private inquiries.[35] For example, the public inquiry into Newfoundland's Mount Cashel orphanage did much to bring the realities of institutional child abuse to light.[36] After their calls for a public inquiry into residential schools were ignored, the First Peoples of Alkali Lake, BC held their own inquiry, presided over by a former judge, as "a small opportunity for Shuswap people to tell their painful stories and to be heard."[37] While such inquiries may lead to civil claims or negotiated compensation packages, they do not in themselves offer financial compensation.

Thus there are many legal avenues open to survivors of sexual assault, as well as more informal, non-legal remedies.[38] As noted above, the Committee believes its study of civil actions for sexual assault is an important part of this web, as it seeks to establish precedents and recommendations which may be essential to the operation of other remedies. While civil litigation is not the only way to address issues of sexual assault, it has been and continues to be an important option for survivors.

D. Representation, Procedure, and Recovery Issues

Assuming that a civil action for damages is pursued, there are several issues that arise relating to legal representation, civil procedure, and recovery of compensation.

In this report, in addition to investigating the assessment of damages in civil actions for sexual assault, we will canvass some of the issues survivors face under the broad heading of access to justice - the availability of information and support for civil actions, the availability and costs of legal representation and disbursements, and court ordered costs. In terms of procedural issues, we will identify issues relating to the feasibility of jury trials in sexual assault cases and the privacy interests of survivors. We will also examine the availability of pre-judgment interest in sexual assault cases, and explore the execution of judgments with a view to a survivor's ability to secure a defendant's assets prior to trial so as to optimize the chances of recovery upon a successful civil action. Lastly, we will review issues arising in the context of settlement agreements, where liability and / or damages are settled without a

35. The Law Commission of Canada (*Restoring Dignity*) reviews "truth commissions," a related redress option, at pp. 267-282 of its report on institutional abuse. There have been no such commissions held specifically on the issue of sexual abuse; rather, commissions such as South Africa's Truth and Reconciliation Commission have dealt with more general human rights abuses.

36. *See* S.H.S. Hughes, *The Royal Commission of Inquiry into the Response of the Newfoundland Criminal Justice System to Complaints. See also* the public inquiry into the Kingsclear Youth Training Centre in New Brunswick, *Report of a Commission of Inquiry Established by Order in Council 92-1022* (Fredericton: The Commission, 1995) (Commissioner R.L. Miller).

37. *See Alkali Residential School Inquiry Report* at 3.

38. For a discussion of extra-legal remedies, *see* West at 109. Such remedies may include counter-violence, civil disobedience, collective security initiatives, and political action.

trial.

Even where a full and fair damage award is made, a survivor of sexual assault must still face the prospect of a defendant with no funds or assets to satisfy the judgment. The availability of insurance coverage for sexual assault would offset this concern, as survivors would then have a source of funds to draw upon to compensate their injuries. This report will canvass the issues arising in relation to insurance coverage for sexual assault, and review the case law which has developed in this area.

Part III. The Particular Focus of the Report

A. The Nature of the Harm Caused by Sexual Assault

The Working Paper raised issues relating to liability for sexual assault as well as compensation issues. However, the Committee has decided to confine this Report to compensation issues, as these issues present unique challenges which merit our undivided attention. We include a short section on liability to ground our work on compensation issues, and, as noted, also look at some of the barriers and procedural issues survivors may face in bringing civil actions for sexual assault.

One of the most vexing issues in civil actions is how to translate the harm of the wrong into monetary damages which will compensate the plaintiff for her or his losses. This issue is particularly difficult in sexual assault cases, where the harm is often emotional rather than physical, and for some, hard to see. As noted by the B.C. Court of Appeal,[39]

> We are just beginning to understand the horrendous impact of sexual abuse. To assess damages for the psychological impact of sexual abuse on a particular person is like trying to estimate the depth of the ocean by looking at the surface of the water. The possible consequences of such abuse presently are not capable of critical measurement.

Often this difficulty has resulted in low awards for sexual assault survivors as compared with plaintiffs in other tort cases. Thus it is critical that a full assessment of the harm of sexual assault be articulated, if the civil courts are to be fully informed and respond both reflectively and sensitively in their deliberations upon damages.

The harm of sexual assault has been canvassed in several judicial decisions in both the criminal and civil spheres, as well as in academic literature, and in the voices of survivors and their advocates. A critical issue is the distinction between the harm inherent in any act of sexual violence, and the additional injuries that may flow as a consequence of a sexual assault.

One of the most recent judicial statements on the inherent harm of sexual assault is that of Mr. Justice Major of the Supreme Court of Canada in the *Ewanchuk* case:[40]

39. *Y.(S.) v. C.(F.G.),* (1996) 26 B.C.L.R. (3d) 155 at 172.

40. *R.* v. *Ewanchuk*, [1999] 1 S.C.R. 330 at para. 28. *See also M.B.* v. *B.C.* (27 March 2001), Victoria CA 27265 (B.C.C.A.) at para. 103.

> Society is committed to protecting the personal integrity, both physical and psychological, of every individual. Having control over who touches one's body, and how, lies at the core of human dignity and autonomy. The inclusion of assault and sexual assault in the [Criminal] Code expresses society's determination to protect the security of the person from any non-consensual contact or threats of force. The common law has recognized for centuries that the individual's right to physical integrity is a fundamental principle, "every man's [sic] person being sacred, and no other having a right to meddle with it in any the slightest manner."

In *R.* v. *Osolin*, Mr. Justice Cory referred to the gendered nature of sexual assault:[41]

> It cannot be forgotten that a sexual assault is very different from other assaults. It is true that it, like all the other forms of assault, is an act of violence. Yet it is something more than a simple act of violence. Sexual assault is in the vast majority of cases gender based. It is an assault upon human dignity and constitutes a denial of any concept of equality for women.

In the civil sphere, McLachlin, J. (as she then was) recently discussed the rationale behind the tort of battery in *Non-Marine Underwriters, Lloyd's of London* v. *Scalera:*[42]

> The tort of battery is aimed at protecting the personal autonomy of the individual. Its purpose is to recognize the right of each person to control his or her body and who touches it, and to permit damages where this right is violated. The compensation stems from violation of the right to autonomy, not fault. When a person interferes with the body of another, a *prima facie* case of violation of the plaintiff's autonomy is made out....
>
> The law of battery protects the inviolability of the person. It starts from the presumption that apart from the usual and inevitable contacts of ordinary life, each person is entitled not to be touched, and not to have her person violated. The sexual touching itself, absent the defendant showing lawful excuse, constitutes the violation and is "offensive."

Earlier, in *Norberg* v. *Wynrib,* Mr Justice La Forest noted that "[i]t is hard to imagine a greater affront to human dignity than non-consensual sexual intercourse."[43]

Survivors themselves have also attempted to put into words the harm of sexual assault. A woman using the pseudonym "Jane Doe" successfully sued the Metropolitan Toronto Police for failing to protect her from a serial rapist.[44] In a newspaper interview prior to her trial, Ms. Doe is said to have "bristle[d] when asked how the rape damaged her life." According to Ms. Doe:[45]

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41. *R.* v. *Osolin*, [1993] 4 S.C.R. 595 at 669.

42. [2000] 1 S.C.R. 551 at paras. 15, 22.

43. *Norberg* v. *Wynrib,* [1992] 2 S.C.R. 226 at 265.

44. *Jane Doe* v. *Metropolitan Toronto (Municipality) Commissioners of Police,* (1998) 160 D.L.R. (4th) 697 (Ont. Gen. Div.).

45. S. Fine, "Woman Suing Police Finds Past Spotlighted" *Globe and Mail* (7 July 1997) A1, as cited in Ross at 1068.

> It's like saying, 'How did having your arm cut off damage your life?' There are damages inherent in the act of rape ... The biggest change for me was the loss of the joy of life ... Your identity is stolen from you, and a portion of you ceases to exist.

At the consultation session held by the Committee in January 2000, individuals working with survivors were asked to describe the harm inherent in sexual assault. Some of their comments were as follows:

> Harm is the loss of citizenship in relation to those who should be equals. It relates to the power to act and take one's rightful place in a situation. Sexual assault may involve public, random acts and private acts that men know will put women in their place.
>
> Sexual assault is a violation of women as individuals, of women's *Charter* rights. Harm should also be seen as a symptom of societal inequalities. Groups less privileged are more harmed, and less likely to have their rights respected. The sexual assaults themselves are not what causes the harm, rather it is the patriarchal society.
>
> Sexual assault is analogous to lynching after the slavery laws were abolished, and functions to keep down a whole class or gender of people. Sexual assault should never be reduced to what just one person suffers.
>
> The inherent harm of sexual assault is total powerlessness with no resources and help. This is abandonment by society as well as an intrusion on women's own boundaries and autonomy. Sexual assault is an event that marks and feminizes women, that sets women apart as a class or a subgroup, and affects women's relationships with other women as well.
>
> Sexual assault is a systematic colonization of the body, mind, spirit and emotions, and takes over what a person is.
>
> Our sense of identity and self is based on our experiences. Sexual assault puts everything into question, and it can take a lifetime to address the issue of who am I; if I was not much of a human being to be treated as this, then who am I?

Thus it has been recognized that sexual assault results in inherent harm to survivors, best described as a loss of dignity, personal integrity, autonomy, and personhood. It is important to note that for some sexual assault survivors, this inherent harm may be compounded by other factors. For example, Aboriginal survivors of residential schools suffered racial, cultural, and spiritual oppression affecting themselves, their families, and communities. Survivors with disabilities, already facing more generalized discrimination and dealing with the challenges of dependency, may experience aggravated feelings of loss and lack of control over their lives. Lesbians and gay men who are targeted for sexual violence may suffer indignities relating to their sexual identity.[46]

46. As we will discuss below, our view is that these compounded harms should be dealt with under the head of aggravated damages.

The needs of survivors of sexual assault, as well as the way(s) in which individual survivors experience sexual assaults, may differ depending on these aspects of their identities. Nevertheless, all of these are matters of equality, giving rise to an obligation on the part of governments and the courts to provide legal protections and remedies which, at the very least, do not perpetuate the inequalities of survivors of sexual assault.[47]

In addition to, and as a result of these inherent harms, individual survivors of sexual assault may experience consequential injuries.[48] Significant factors influencing the extent of consequential injuries include the survivor's age at the time of the assault(s), the frequency and duration of the assaults, the level of violence and interference, the presence or absence of family support, and whether there was or is an ongoing relationship with the perpetrator.[49] Consequential injuries may include depression, anxiety, mood disorders, and disturbances of sleep, eating, sexuality, personality, and interpersonal relationships. In addition, sexual abuse of children frequently has profound effects on child development, learning abilities, schooling, family relationships, ability to form intimate relationships, and ability to deal with authority figures. Substance abuse, prostitution, and homelessness are common where children are forced to flee the home to escape sexual abuse. Suicide is much higher among those who have been sexually abused as children than among the general community.[50]

The extent of a survivor's consequential injuries will vary dramatically, depending upon the above noted factors, as well as factors related to the survivor's vulnerability. In contrast, the inherent harm of sexual assault is a constant, involving loss of dignity, personal integrity, autonomy, and personhood. As we will argue below, it is critical that courts differentiate between these two kinds of harms in making civil damage awards.

47. *See R.* v. *Mills* at para. 59 for a discussion of "horizontal" equality concerns.

48. There are also consequences experienced by potential victims. For example, it was noted in the *Jane Doe* case at 702 that "one of the consequences of the pervasiveness of male sexual violence in our society is that most women fear sexual assault and in many ways govern their conduct because of that fear."

49. *See* K.A. Kendall-Tackett et al., "Impact of Sexual Abuse on Children: A Review and Synthesis of Recent Empirical Studies" (1993), 113(1) Psychological Bulletin 164 at 170.

50. *See* P.E. Mullen et al., "Childhood Sexual Abuse and Mental Health in Adult Life" (1993), 163 British Journal of Psychiatry 721; B.A. van der Kolk et al., "Childhood Origins of Self-Destructive Behaviour" (1991), 148(12) American Journal of Psychiatry 1665; Kendall-Tackett et al. at 165-167.

B. Civil Liability and its Importance as a Vehicle for Doing Justice in Sexual Assault Cases

According to Cooper-Stephenson, the civil justice system, as it relates to the compensation of injuries, "is based on a sense of the moral distribution of societal resources."[51] While the principle of individual compensation dominates this area, elements of distributive justice and deterrence are also at play: the system allocates resources on the basis of merit, need, and responsibility, and often distributes the risk. At the same time, it seeks to correct both individual and institutional wrongs. The coordination of these principles results in "a system which is proscriptive and deterrent in character as well as caring and rehabilitative."[52]

Civil actions for sexual assault provide an important example of how these principles can be applied in practice. First, such actions may provide compensation to survivors for the inherent harm of sexual assault, and the consequential injuries resulting from sexual assault. Second, there are ways and means whereby the risk of loss may be distributed by the invocation of corporate, institutional, and vicarious liability and through insurance. Third, civil actions may assist in preventing the future commission of both intentional torts, such as assault and battery, and unintentional torts, such as negligence. In the case of intentional torts, the fact that perpetrators may be liable to have their conduct scrutinized in a public forum, and to pay large damage awards, may serve to prevent future conduct of a similar nature. In the case of negligence and fiduciary duties, civil actions may impress upon those in positions of power, such as institutions, employers, landlords, and so on, that they have a duty to take steps to prevent sexual assault from occurring within their realm of responsibility.

Moreover, the civil justice system may be very influential in framing and setting benchmarks for other processes dealing with sexual assault claims. This will help ensure that the harm of sexual assault is properly recognized and redressed regardless of the remedial option(s) chosen by the survivor.

The challenge is that there has been little existing guidance for the courts in translating the harms inherent in sexual assault into damage awards. In many respects, the harms of sexual assault are unique in that they may be devastating, yet invisible to the untrained observer. While the courts have begun to contemplate the appropriate range of damage awards for sexual assault, and to enumerate the factors and considerations which are relevant to making assessments of damages, there is still a need for benchmarks dealing with the level of damages required to compensate the harm inherent in, and consequential to, sexual assault. Further, as our analysis will show, there is a scarcity of cases dealing with the harms that may be sustained by adult survivors and those who were vulnerable to sexual assault, or targeted because of their race, culture, disability, sexual identity, or other personal characteristics.

51. K. Cooper-Stephenson, *Personal Injury Damages in Canada* (Toronto: Thomson Canada Ltd., 1996) at 1-2.

52. *Ibid.* at 6.

Part IV. Principles Underlying the Study

Given that the focus of this report is on compensation issues, the Committee makes the initial assumption that liability is not in question. Our analysis assumes that there is an individual and / or institution which can be held legally responsible for the harms arising from sexual assault, and focuses on ensuring that survivors, those who have been sexually assaulted, are fairly compensated for these harms.

The Committee's analysis of issues arising in fairly compensating survivors of sexual assault has been guided by a number of principles. These include the following:

1. Sexual assault is a serious matter, resulting in inherent harm to survivors. This harm has not yet been fully recognized by the civil justice system.

2. The civil justice system, while not perfect, is an important process for recognizing the serious nature of sexual assault, awarding compensation to survivors, changing the behaviour of and deterring defendants, and establishing benchmarks for use in other proceedings.

3. It is a reasonable expectation for survivors of sexual assault to look to the civil courts as a means of redress.

4. While recognizing that no amount of money can provide complete restitution, the general purpose of the civil damages system is to attempt as much as possible to place the plaintiff in the state she or he was in prior to the wrongful conduct. The challenge in sexual assault cases is to recognize and quantify the survivor's inherent harm and consequent injuries into a damage award which reflects that restorative principle.

5. Although sexual assault cases raise some issues which are unique, damage awards for sexual assault should be, as far as possible, in line with awards made in other tort cases.

6. There must be attention to diversity in the circumstances and needs of survivors, and to differing forms of harm which flow from sexual assault.

7. Sexual assault is a practice which is not neutral in terms of the gender, race, culture, class, abilities, age, and sexual identity of survivors. As such, principles of equality must be considered in assessing what is fair in compensating survivors.

Part V. Civil Actions for Sexual Assault

A. The Nature of Civil Actions

There has been some attention in the academic literature as to whether civil actions for damages are "therapeutic" for survivors of sexual assault. While a detailed examination of this question is beyond the scope of this study, the Committee believes it is useful to examine a claimant's potential reasons for pursuing a civil action. Knowledge of survivors' reasons for pursuing a civil action is a critical part of the inquiry into the ability of the civil justice system to effect justice in sexual assault cases. Of course, civil remedies must not only respond to a plaintiff's expectations; they must also be fair to the defendant and respond to the public's sense of what is fair and just.

Sexual assault survivors' reasons for considering a civil action for damages may be varied, and may change over time as their healing and their understanding of their losses progresses. In addition, the reasons for bringing a civil action may depend upon a survivor's relationship with the defendant(s), personal characteristics, and access to a support network. Some of the reasons commonly noted for bringing a civil action for damages for sexual assault include the following: to seek an apology; to seek monetary compensation; to protect or assist other (potential) victims; to assist with the healing process; to obtain public validation of claims; to bring an offender to justice; and to seek revenge.[53]

B. Basis of Liability

As a preliminary to a review of how damages are quantified in sexual assault cases, it is important to set out the bases upon which defendants may be held liable. Bases of liability are important in a general sense, because a finding of liability is essential to the plaintiff securing remedies such as compensation. Moreover, it is in this context that a court will have the opportunity to make statements about the responsibilities and conduct of the defendant(s) in this area of human interaction. More specifically, bases of liability are significant in terms of who will be obliged to pay damages, and under what circumstances, as well as what heads of damages are available and what measure of damages is considered appropriate. Bases of liability may also be relevant to procedural issues such as the availability of pre-judgment interest, and the obligation of insurers to defend sexual assault actions and provide indemnity for insured defendants.

This section of the report briefly describes the relevant heads of liability available in sexual assault cases in relation to perpetrators, other individuals, and institutional defendants. It is important at the outset to note that many of these heads of liability overlap.

53. *See* B. Feldthusen, O. Hankivsky and L. Greaves, "Therapeutic Consequences of Civil Actions for Damages and Compensation Claims by Victims of Sexual Abuse" (2000), 12 C.J.W.L. 66 at 69. The authors conducted a study in which they interviewed 87 survivors of sexual assault who had pursued remedies through civil litigation, criminal injuries compensation, or government compensation procedures. The majority of claimants identified therapeutic motivations as stronger than compensatory motivations in pursuing remedies, and for most, monetary compensation was "low on the agenda" (at 75, 79).

1. Assault and Battery

Liability of the actual perpetrators of sexual assault is most often based on the tort of assault and battery. Battery occurs when a person intentionally causes harmful or offensive contact with another person without her consent, and assault occurs when a person intentionally creates the apprehension of such contact. Assault and battery are intentional torts, meaning that the actor must intend the consequences flowing from his act. Improper sexual contact clearly falls within these definitions.[54]

The purpose of these torts is to protect the personal interests of bodily security and integrity, and more broadly, to reduce the incidence of violence in society.[55] Liability of the defendant may be found even where there is no physical injury to the plaintiff. In battery cases it may be argued that liability flows even where the plaintiff is unaware of the interference at the time it occurred.

2. Negligence

In contrast to assault and battery, the tort of negligence applies to those situations where injuries are unintentionally, that is, carelessly, caused. The main objectives of the law of negligence are to compensate those whose injuries result from another's "faulty conduct," and to deter careless behaviour.[56]

In order to bring a successful claim in negligence, a plaintiff must prove that she suffered a form of harm which the law recognizes as meriting compensation; that there is a legal duty of care to avoid causing such harm; and that the defendant's conduct breached the duty of care by departing from what a reasonable person would have done or not done faced with the same situation as the defendant.[57] There are also elements of causation which must be proved. These will be discussed in a following section.

In the sexual assault context, negligence actions may lie against institutional defendants and individual defendants apart from the actual perpetrators. For example, actions in negligence have succeeded against a landlord which failed to protect its tenants from an assaultive employee;[58]

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54. While such cases are most often examples of "battery," as there is non-consensual physical contact, "sexual assault" is the more commonly used term, and will be employed in this Final Report.

55. Linden, *Canadian Tort Law*, 6th ed. (Toronto: Butterworths, 1997) at 42, 45.

56. *Ibid.* at 97-98.

57. *Ibid.* at 99.

58. *Q.* v. *Minto Management*, (1985) 49 O.R. (2d) 531 (H.C.J.).

a police force for failing to warn and protect women who were at particular risk of being sexually assaulted by a serial rapist;[59] a correctional services branch for failing to conduct a search and promptly notify police after the escape of a dangerous offender;[60] and employers for failing to properly screen, train, supervise, or take action against their employees for sexually assaulting those in their care.[61]

Actions in negligence have also been brought against individual care-givers, where it is alleged that they failed to protect those in their care from being sexually assaulted.[62] These claims have alleged that the care-giving relationship gives rise to a duty to protect a child in one's care from abuse, and corresponding obligations to investigate signs of abuse and to take action to prevent further abuse. What test should be applied to determine whether the care-giver should have known or made further inquiries has presented a challenge to courts. So far the benefit of the doubt has been given to the care-giver.[63]

The propriety of holding non-offending care-givers liable for negligence in cases of child sexual abuse is a complex issue. From the plaintiff's perspective, such actions provide another source of compensation, and may have implications for the availability of insurance coverage. In our consultations on this issue, the point was raised that the plaintiff, being in control of the lawsuit, has the right to choose who will be sued. On the other hand, finding individual care-givers, usually women, liable has been criticized on the basis that this "reflects and perpetuates an ideology of mother-blaming" which "deflects attention from the adult male perpetrator's responsibility for his conduct and its harmful consequences, but also obfuscates the responsibility that our social institutions have for the widespread violence perpetrated against women and children."[64] There may be valid reasons for a care-giver failing to intervene, for example, where she was the victim of domestic abuse. In our consultations, the point was raised that it would be

59. *Jane Doe* v. *Metropolitan Toronto (Municipality) Commissioners of Police*.

60. *S.(J.)* v. *Clement,* (1995) 22 O.R. (3d) 495 (Ont. Gen. Div.).

61. *See* for example *R.(G.B.)* v. *Hollett,* (1995) 143 N.S.R. (2d) 38 (S.C.), *aff'd* in part (1996) 154 N.S.R. (2d) 161 (C.A.) leave to appeal to S.C.C. refused, (1997) 160 N.S.R. (2d) 80 (note).

62. These actions must be distinguished from those commenced against institutional care-givers such as schools, group homes, and so on.

63. No such actions have been successful in BC to date. *See* for example *M.(M.)* v. *F.(R.)*, (1997) 101 B.C.A.C. 97 (B.C.C.A.), where a claim in negligence against a woman for failing to protect her foster daughter from the abuse of the woman's son was dismissed. There has, however, been a successful action in Ontario against a mother who failed to protect her daughter from sexual abuse. *See J.(L.A.).* v. *J.(H.),* (1993), 13 O.R. (3d) 306 (Gen. Div.).

64. *See* E.K.P. Grace and S.M. 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 C.J.W.L. 184 at 193.

unjust to hold women liable in such circumstances, given the lack of adequate support and resources available to assist them in leaving abusive relationships. Overall, our consultations did not achieve consensus on the propriety of finding individual non-offending care-givers liable in sexual assault cases, and we decline to make a recommendation on this difficult issue. As noted, the case law in this area sets a high bar for finding liability on the part of individual care-givers. Where such actions are brought, the Committee is of the view that the principles of negligence and breach of fiduciary duty should continue to be interpreted so as to relieve the non-offending care-giver of responsibility, except in the most flagrant of cases where there are no extenuating circumstances.

There are also cases in which perpetrators have sought to add non-offending care-givers as third parties to civil actions for sexual assault. Thus far, no such actions have been successful in BC.[65]

It is the opinion of the Committee that third party actions against non-offending care-givers should continue to be disallowed by the courts. Such actions essentially subvert the plaintiff's choice of who to sue. This type of action also makes family reconciliation unlikely, which may be an important consideration for Aboriginal survivors of sexual assault, and is often an extension of the power and control that sexual assault perpetrators exert over their victims and families. In our view, it would be appropriate for the courts to discourage such third party claims by awarding special costs against the defendant, or by requiring leave of the court to add an individual non-offending care-giver as a third party to a sexual assault action.

3. Vicarious Liability

Vicarious liability refers to the principles according to which an individual, or more often, an institution, is found legally responsible for the tortious conduct of another with whom there is an ongoing economic relationship. This form of liability is most often applied to hold employers liable for torts committed by their employees in the course of employment.[66]

In the sexual assault context, plaintiffs may rely on the doctrine of vicarious liability to hold institutions accountable for sexual abuse. Recent case law has established that employers are vicariously liable either for acts of their employees which were authorized by the employer, or for unauthorized acts of their employees which were so connected with authorized acts that they

65. In *T.(L.)* v. *T.(R.W.)* (27 May 1997), Vancouver C940232 (B.C.S.C.), the perpetrator joined the mother as a third party to the action, seeking contribution or indemnity on the basis that she knew or should have known he was sexually abusing their daughter. The court held that even if the mother had been negligent, the breach of the duty to protect "did not contribute to the plaintiff's injuries independently of the defendant's actions"; thus, there was no basis for contribution or indemnity. In *Vickers* v. *Rondpre* (6 April 1994), Vancouver C921471 (B.C.S.C.), the third party notice against the mother was struck by the court on the basis that it was against public policy for an intentional tortfeasor to be able to claim indemnity and contribution from another person.

66. P.S. Atiyah, *Vicarious Liability in the Law of Torts* (London: Butterworths, 1967) at 3.

amount to modes of doing an authorized act.[67]
In applying the second branch of this test to sexual assault cases, the issue is[68]

> whether the employer's enterprise and empowerment of the employee materially increased the risk of the sexual assault and hence the harm. The test must not be applied mechanically, but with a sensitive view to the policy considerations that justify the imposition of vicarious liability – fair and efficient compensation for wrong and deterrence. This requires trial judges to investigate the employee's specific duties and determine whether they gave rise to special opportunities for wrongdoing. Because of the peculiar exercises of power and trust that pervade cases such as child abuse, special attention should be paid to the existence of a power or dependency relationship, which on its own often creates a considerable risk of wrongdoing.

In lower court decisions in BC,[69] the principles of vicarious liability have been applied to hold the following institutions and individuals liable: the Crown for sexual abuse committed in a youth detention facility;[70] abuse committed by foster parents;[71] residential school abuse;[72] and various churches for sexual abuse perpetrated by priests or other employees.[73] A claim of vicarious liability against a school board for the sexual assaults of a janitor upon a student was unsuccessful.[74]

In two recent cases,[75] the BC Court of Appeal set out its views on the applicability of the doctrine of vicarious liability to cases involving sexual assaults upon foster children. The three members of the Court hearing the cases differed in their approaches on this issue. Mackenzie, J.A. ruled

67. *Bazley v. Curry,* [1999] 2 S.C.R. 534 at para. 10. *See also Jacobi* v. *Griffiths*, [1999] 2 S.C.R. 570.

68. *Ibid.* at para. 46.

69. These cases all pre-date the Supreme Court decisions in *Curry* and *Jacobi*. Many of the cases are under appeal.

70. *See A.(C.)* v. *C.(J.W.)*, (1997) 35 B.C.L.R. (3d) 234 at 263 (S.C.). The finding of vicarious liability against the Crown was upheld on appeal. *See A.(C.) v. C.(J.W.)*, (1998) 41 B.C.L.R. (3d) 193 (B.C.C.A.). An appeal to the Supreme Court of Canada was not pursued.

71. *See K.L.B.* v. *B.C.* (3 March 1998), Vancouver C944099 (B.C.S.C.); *M.B.* v. *British Columbia (*3 May 2000), Vancouver C970404 (B.C.S.C.). The appeal decisions in these cases are discussed *infra*.

72. *See B.(W.R.)* v. *Plint*, (1998) 161 D.L.R. (4th) 538 (B.C.S.C.). Issues of breach of fiduciary duty, negligence and damages were heard at a later date, and have not yet been ruled upon.

73. *See K.(W.) v. Pornbacher*, (1997) 32 B.C.L.R. (3d) 360 (S.C.)*; B.(W.R.)* v. *Plint; M.(F.S.)* v. *Clarke*, [1999] 11 W.W.R. 301 (B.C.S.C.). These cases are all under appeal. For a decision to the contrary, *see McDonald* v. *Mombourquette*, (1995) 145 N.S.R. (2d) 360 (N.S.S.C.), *rev'd* (1996) 152 N.S.R. (2d) 109 (C.A.), leave to appeal to S.C.C. refused, [1996] S.C.C. No. 504.

74. *See E.D.G.* v. *Hammer et al*, (1998) 53 B.C.L.R. (3d) 89 at 102 (B.C.S.C). The finding of no vicarious liability was not challenged on appeal.

75. *M.B.* v. *British Columbia* (27 March 2001), Victoria CA27265 (B.C.C.A.); *K.L.B.* v. *B.C.* (27 March 2001), Vancouver CA024422 (B.C.C.A.). A third decision was released by the Court the same day. *See E.D.G.* v. *North Vancouver School District No. 44* (27 March 2001), Vancouver CA024602 (B.C.C.A.).

that the doctrine of vicarious liability should be restricted to those cases where there is an employer-employee relationship, and should not apply to hold the Crown liable for the acts of independent contractors such as foster parents. In his view, the latter situations should be dealt with under the principles of non-delegable duty, which will be discussed below.[76] Prowse, J.A. held that the application of the principles of vicarious liability should depend upon the true nature of the relationship in question, rather than the fact that the foster parents were "independent contractors" as opposed to employees. She found that the doctrine of vicarious liability should apply where the Crown places children in the "day-to-day parental care" of foster parents, thereby materially increasing the risk of sexual assault.[77] Chief Justice McEachern disagreed with these approaches, finding that the Crown should not be vicariously liable for placing children in family homes as opposed to institutional settings. In his view, "the measure of supervision and control of a private foster home - the choice of the legislature as the best society can do for these children - is not such that the Superintendent should be legally responsible for unforeseen, and usually unforeseeable, aberrations such as occurred in this case." Rather, these cases should be dealt with under the principles of negligence.[78]

Commentators on the Working Paper also had some concerns about the imposition of vicarious liability on the Crown in the sexual assault context. According to these commentators, the Crown is in a unique position, given its role in child protection and the prevention of conduct such as sexual assault. Moreover, where the Crown is found to be vicariously liable, this raises complex issues as to who must pay, and how, for the costs of sexual assault. The same concerns were said to be true of non-profit institutional defendants, which provide valuable public services and face enormous constraints when it comes to the costs of civil suits for sexual assault.

The Committee has considered these comments, but believes that there should be no exemption from the principles of vicarious liability, nor a different test, for the Crown or for non-profit organizations. As stated by the Supreme Court in *Curry*, "given that a choice must be made, it is fairer to place the loss on the party that introduced the risk and had the better opportunity to control it."[79] Moreover, we believe it is fitting that the public take responsibility for the harms of sexual assault through liability of the Crown in appropriate cases.

76. *M.B.* v. *B.C.* at para. 90 (B.C.C.A.).

77. *Ibid.* at para. 49. See also *K.L.B.* v. *B.C.* at para. 58 (B.C.C.A.).

78. *M.B.* v. *B.C.* at paras. 125-134 (B.C.C.A.)

79. *Curry* at para. 54.

4. Breach of Non-Delegable Duty

The doctrine of non-delegable duty relates to the liability of principals for the acts of independent contractors, and is applied most often in relation to the duties of the Crown. In sexual assault cases, the issue of whether duties are non-delegable may arise where a government privatizes aspects of its child care operations.

This doctrine was considered by the Supreme Court of Canada in the case of *Lewis (Guardian ad litem of)* v. *B.C.* In this case, Cory, J., for the majority of the Court, summarized the test for non-delegable duty as follows:[80]

> Whether the duty of care owed by a defendant may be discharged by exercising reasonable care in the selection of an independent contractor will depend upon the nature and extent of the duty owed by the defendant to the plaintiff ... In some circumstances, the duty to take reasonable care may well be discharged by hiring and, if required, supervising a competent contractor to perform the particular work. ...
>
> It is clear that a party upon whom the law has imposed a strict statutory duty to do a positive act cannot escape liability simply by delegating the work to an independent contractor. Rather a defendant subject to such a duty will always remain personally liable for the acts or omissions of the contractor to whom it assigned the work.

In *Lewis*, Cory, J. held that both the applicable statutory provisions and policy considerations led to the conclusion that the provincial Crown was directly liable for the failure to properly maintain its highways, and the resulting injury to the plaintiff driver. In terms of policy considerations, Cory J. noted that the "particular vulnerability of the travelling public," their entitlement to rely upon the defendant as responsible for taking reasonable care, and the complete control of the defendant over the work in question were relevant factors in finding the defendant liable. In addition, injured persons should not "have to seek out the identity of the contractor responsible in order to bring an action and trust to luck that that contractor is financially responsible."[81] Cory, J. rejected the argument that the Crown would become "an insurer for every failure of maintenance on the highways," finding that the requirement of negligence on the part of the contractor negated such concerns.

The applicability of the doctrine of non-delegable duty in the sexual assault context was considered by the BC Court of Appeal in a trilogy of cases released on March 27, 2001. In *M.B.* v. *British Columbia* and *K.L.B.* v. *B.C.*, a majority of the Court held that this doctrine should apply in the case of the Crown's responsibilities for children placed into foster care. According

80. [1997] 3 S.C.R. 1145 at 1157-1159. *See also* the companion case of *Mochinski* v. *Trendline Industries Ltd.*, [1997] 3 S.C.R. 1176.

81. *Lewis* at 1166-1167.

to Madam Justice Prowse,[82]

> the Superintendent [of Child Welfare] undertook the care, supervision or control of the plaintiff who was committed to his care under the Act. In my view, he was so placed in relation to the plaintiff as to assume a particular responsibility for her safety, in circumstances where the plaintiff might reasonably expect that due care (if not special diligence) would be exercised. In other words, the relationship between the Superintendent and the plaintiff in these circumstances fell within the class of relationships which, on a policy basis, supported a finding of a non-delegable duty.

Madam Justice Prowse noted that the term "non-delegable duty" is "somewhat misleading. To call a duty non-delegable does not mean that the duty cannot be delegated, but, rather, that ultimate responsibility for the performance of the duty cannot be delegated. Responsibility for the performance of the duty remains with the delegator who will be held liable in the event that the duty is not performed, or if it is performed negligently or tortiously."[83] The Crown was found by a majority of the Court to have breached such a duty in both cases, based upon the underlying torts of the independent contractors. While Madam Justice Prowse viewed the doctrine of non-delegable duty as one which might apply contemporaneously with vicarious liability, Mr. Justice Mackenzie was of the view that it should apply to situations involving independent contractors, while vicarious liability should be restricted to employment situations.[84] This difference in opinion resulted in a majority of the Court finding in another case against the imposition of non-delegable duties against a school board for the tortious conduct of its former employee, a janitor.[85]

Chief Justice McEachern rejected the notion that the law in this area should be developed to include liability for breach of non-delegable duties:[86]

> I think it is wrong for judges, except where directed by binding authority, to impose potentially enormous no-fault liabilities on public authorities through the use of inapplicable legal theories. ... If compensation should be paid for damage caused in circumstances that do not fit the existing law, the proper course is to leave such matters to the legislature rather than to stretch and distort principles developed for different purposes in order to achieve a desired result.

Comments of Prowse, J.A. point to the division of the Court on this important question of policy:[87]

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82. *M.B.* v. *B.C.* (B.C.C.A.) at para. 82.

83. *Ibid.* at para. 73.

84. *Ibid.* at para. 90. See also *K.L.B.* v. *B.C.* at paras. 27 to 29 (B.C.C.A.).

85. *See E.D.G.* (B.C.C.A.).

86. *M.B.* v. *B.C.* at paras. 118-119 (B.C.C.A.) .

87. *Ibid*. at para. 76.

> It may well be that the law has developed to the point where children's claims to fair compensation for injuries they have suffered at the hands of surrogate caregivers may impose heretofore unknown liability on parents or guardians. From the point of view of children, this could be viewed as a positive, not ominous, development. In any event, those cases will have to be decided on their individual facts, as and when they arise. There may well be other policy considerations, or other legislation, which militate against finding liability on the part of parents or other caregivers in the examples referred to by the Crown that do not apply in this case. In that regard, it must be remembered that the issue of whether a non-delegable duty arises in this case, as in *Lewis*, turns primarily on an analysis of the relevant legislation.

As noted, the Committee is restricting its recommendations in this report to those involving issues of compensation, and thus we will not express an opinion on this policy issue. In keeping with the views of a majority of the Court of Appeal, we will assume for the purposes of the report that breach of non-delegable duty is one of the bases of liability upon which survivors of sexual assault may rely in BC.

5. Breach of Fiduciary Duty

In contrast to the law of negligence, which presumes "independent and equal actors," a fiduciary relationship and consequent obligations arise from a condition of trust and dependency.[88] The Supreme Court of Canada has noted three general characteristics of relationships in which fiduciary obligations have been imposed:

1) The fiduciary has scope for the exercise of some discretion or power.
2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.[89]

In *A.(C.)* v. *C.(J.W.)*, the British Columbia Court of Appeal added a fourth requirement for a finding of a breach of fiduciary duty: the defendant must "personally [take] advantage of a relationship of trust or confidence for his or her direct or indirect personal advantage."[90] According to Chief Justice McEachern,[91]

> [t]his excludes from the reach of fiduciary duties many cases that can be resolved upon a tort or contract analysis, has the advantage of greater certainty, and also protects honest persons doing their best in difficult circumstances from the shame and stigma of disloyalty or dishonesty. In effect, this

88. *Canson Enterprises* v. *Boughton & Co.,* [1991] 3 S.C.R. 534 at 543 (*per* McLachlin, J.).

89. *Frame* v. *Smith*, [1987] 2 S.C.R. 99 at 136, *per* Wilson, J.

90. At para. 85. Leave to appeal this case was granted by the Supreme Court of Canada, but was not pursued.

91. *Ibid.*

> redirects fiduciary law back towards where it was before this experiment began but with much broader remedies, such as damages, when fiduciary duties are actually breached.

This development has resulted in a number of lower court decisions on breach of fiduciary duty being overturned on appeal in BC.[92] While this fourth requirement has not yet been considered by the Supreme Court of Canada, leave to appeal is being sought in at least two cases.[93]

While we have decided not to make recommendations on liability issues in this report, the Committee notes that the approach of the BC Court of Appeal to breach of fiduciary duty departs from that adopted by the Supreme Court of Canada since the early 1990s, when the existence of fiduciary relationships in the sexual assault context was first recognized.[94] Even apart from relationships clearly recognized as fiduciary, fiduciary obligations have been imposed where the circumstances dictate such a result. The doctrine has been applied to parents,[95] as well as to those in the position of parents,[96] and to schools.[97] In these situations, the fiduciary relationship imposes duties to take care of a child in one's custody, to act in the child's best interests, and not to personally injure the child. Priests, as well as a church, have also been found in breach of their fiduciary duties, and liable to compensate plaintiffs for injuries arising out of sexual abuse.[98] Last, the Crown has fiduciary obligations in certain circumstances, for example, in relation to

92. See *K.L.B.* v. *B.C.* at paras. 22-23 (B.C.C.A.); *E.D.G.* at paras. 22-23 (B.C.C.A.). The plaintiff's appeal of the dismissal of her claim for breach of fiduciary duty was not pursued in *M.B.*, given the decision in *A.(C.)* v. *C.(J.W.)*.

93. *K.L.B.* v. *B.C.*; *E.D.G.*

94. *See Norberg* v. *Wynrib*, [1992] 2 S.C.R. 226, where a physician was found to be in breach of duties flowing from his fiduciary relationship with his patient in circumstances where he took sexual advantage of her.

95. *M.(K.)* v. *M.(H.)*, [1992] 3 S.C.R. 6, a case involving incest. *See also J.(L.A.)* v. *J.(H)* at 313-316, where a fiduciary duty was found to have been breached where a mother failed to protect her child from sexual abuse.

96. In the case of step-parents, *see J.(L.A.)* v. *J.(H.)* at 312-313. In the case of foster parents, *see M.(M.)* v. *F.(R.); K.L.B.* v. *B.C.* (B.C.S.C.); and *M.B.* (B.C.S.C.).

97. *See E.D.G.* (B.C.S.C) at paras. 40-41. While it was found that the school board owed a fiduciary duty to the plaintiff in this case, it was found not to have breached that duty. This finding was upheld on appeal, based on the BC Court of Appeal decision in *A.(C.)* v. *C.(J.W.). See E.D.G.* (B.C.C.A) at para. 23.

98. *See K.(W.)* v. *Pornbacher*, where the defendant priest and church were found to be in a fiduciary relationship with the plaintiff, "based on the trust reposed in the church and its representatives as spiritual leaders of the Catholic community." The Church, through the Bishop, was also found liable in negligence (at 375). This case, which was decided before *A.(C.)* v. *C.(J.W.),* is under appeal. *See also M.(F.S.)* v. *Clarke*, where the Anglican church was found to be in breach of fiduciary duty in the context of residential school abuse.

Aboriginal peoples[99] and children who are wards of the state.[100]

Where there is a breach of fiduciary obligations owed to the beneficiary, this gives rise to a claim in equity.[101] Equitable claims differ from those made at common law (such as negligence) in a number of important ways. Reasonable foreseeability of damages is not required to hold a defendant liable for breach of fiduciary duty,[102] and the rules of causation are more favourable to plaintiffs.[103] In addition, claims based on a breach of fiduciary duty may have implications for issues such as the availability of pre-judgment interest,[104] and the obligation of insurers to defend civil actions.

The Committee urges the courts to settle the requirements for a finding of breach of fiduciary duty in the sexual assault context, so that plaintiffs may frame their actions in an appropriate fashion, and all parties may reasonably anticipate the outcome of such claims. Only when the legal principles surrounding breach of fiduciary duty are settled will the resolution of sexual assault claims without litigation be possible. This is critical to the interests of plaintiffs, given their relative lack of resources as compared with institutional defendants.

6. Breach of Charter Duty

Under the *Canadian Charter of Rights and Freedoms*, the federal, provincial, and territorial governments are bound to uphold certain rights and freedoms in their legislation, and in their conduct more generally. These include the right to life, liberty, and security of the person, and the right to equality before and under the law.[105] Where a person's rights or freedoms have been unjustifiably infringed by state action, that person may seek a remedy under the *Charter,*

99. *See Guerin* v. *R.,* [1984] 2 S.C.R. 335; *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075; *Delgamuukw* v. *BC,* [1997] 3 S.C.R. 1010. These cases were all decided in the context of land or resources. There have been no decisions to date on the fiduciary duties of the Crown in the residential school context. This issue is being considered in *B.(W.R.)* v. *Plint.*

100. *See A.(C.)* v. *C.(J.W.)* at 257-258 (B.C.S.C.). As noted, the finding of a breach of fiduciary duty was overturned on appeal. *See* at para. 86 *A.(C.) v. C.(J.W.)*, 1998 60 B.C.L.R. (3d) 92.

101. *See Lac Minerals* v. *International Corona Resources*, [1989] 2 S.C.R. 574 at 647 (*per* La Forest, J.).

102. *Canson Enterprises Ltd.* at 552; *Norberg* at 290.

103. E. Grace and S. Vella, *Civil Liability for Sexual Abuse and Violence in Canada* (Toronto: Butterworths., 2000) at 218.

104. *See infra* section E3.

105. *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B of the *Canada Act, 1982* (U.K.), c.11 [hereinafter "the *Charter*"], ss. 32, 7 and 15. The duty to uphold the *Charter* is subject to the proviso that governments may pass laws which infringe upon rights and freedoms where the law is a reasonable limit that can be "demonstrably justified in a free and democratic society."

including a declaration that the plaintiff's rights were infringed, and in some circumstances, an award of damages.

There may be cases where the government breaches its *Charter* duties in the sexual assault context. For example, in *Jane Doe* v. *Metropolitan Toronto (Municipality) Commissioners of Police,* a woman who was sexually assaulted by a serial rapist successfully sued the police for negligence and breach of the *Charter* in circumstances where the police failed to warn her of the presence of a serial rapist in her community because of "adherence to rape myths as well as sexist stereotypical reasoning about rape, about women and about women who are raped."[106] The defendants were also found to have "deprived the plaintiff of her right to security of the person by subjecting her to the very real risk of attack by a serial rapist – a risk of which they were aware but about which they quite deliberately failed to inform the plaintiff or any women living in the … area at the time ..."[107]

In the end result, the court granted the plaintiff a declaration that her rights under the *Charter* had been infringed, as well as damages for her claim in negligence. The interplay between common law damages and *Charter* remedies will be discussed below. At this stage, it must be noted that while the *Charter* may provide a basis of liability in some circumstances, it only applies to state actors, and thus the scope of such claims may be rather limited.

7. Conclusion

In conclusion, there are six bases of liability which may be relevant in sexual assault cases: assault and battery, negligence, breach of non-delegable duty, vicarious liability, breach of fiduciary duty, and breach of the *Charter*. Perpetrators are most commonly found liable for assault and battery, and, where there was a trust relationship, breach of fiduciary duty. Individuals other than the perpetrator are most commonly found liable for negligence and breach of fiduciary duty. Institutional defendants may be found liable in negligence, breach of fiduciary duty, or may be found vicariously liable. Government defendants may also be found liable for breach of the *Charter,* or for breach of their non-delegable duties.

A plaintiff may choose to sue any combination of these actors, and generally speaking, all defendants found to be liable will be jointly responsible for compensating the plaintiff for her injuries. The concept of joint and several liability allows a plaintiff to recover 100% of her damages from any defendant or defendants who contributed to her losses. It is then up to the defendants to seek contribution from others who shared liability, according to their respective

106. At 734. The plaintiff's claim in negligence was also allowed by the court. The court held that the police were "grossly negligent" in failing to warn the plaintiff of the risk of being raped (at 738).

107. *Ibid.* at 734-735.

degrees of fault.[108] For example, if a plaintiff sued both the perpetrator of a sexual assault and his employer, it would be possible for a court to find the perpetrator liable for the tort of assault, and his employer vicariously liable for this tort, or liable in negligence. Both defendants would be jointly and severally responsible for compensating the plaintiff for her injuries. There are some exceptions to this general rule, however. There is normally no joint liability for aggravated or punitive damages, as these damages "are assessed on the basis of the particular malice of each joint tortfeasor."[109]

C. Causation

The doctrine of causation relates to the issue of whether the defendant(s) can be said to have caused the plaintiff's injuries such that they are liable to compensate the plaintiff's losses. Causation provides the link between a finding of fault on the part of the defendant, and his obligation to pay damages to the plaintiff. There are 3 types of causation which will be canvassed in this report. First is the notion of factual causation, or cause and effect. Second is the concept of proximate or legal causation, which relates to the closeness of the connection between the defendant's conduct and the plaintiff's injuries. Third is the relative responsibility of more than one tort-feasor (wrongdoer) to compensate the plaintiff's injuries.

In 1996, the Supreme Court of Canada last reiterated the fundamental principles relating to factual causation. If the plaintiff can prove on a balance of probabilities that but for the conduct of the defendant, the plaintiff's injuries would not have occurred, then causation will be established. If this test cannot be met, for example where there are multiple causes of a plaintiff's injuries, any one of which might be sufficient in itself to have caused the plaintiff's injuries, then the inquiry turns to whether the conduct of the defendant "materially contributed" to the plaintiff's injuries.[110]

The issue of multiple causes is of particular significance in sexual assault cases where defendants may allege that there are other explanations for the plaintiff's injuries, thereby seeking to excuse their obligation to pay damages, or to reduce the quantum of damages for which they are liable. There are a number of different scenarios to consider. First, the injuries for which the plaintiff is seeking damages may have been caused by both the conduct of the defendant, and another, non-tortious (non-wrongful) event or events. Second, the injuries for which the plaintiff is seeking damages may have been caused by more than one instance of tortious conduct, involving more than one tort-feasor. In both of these situations, the nature and timing of the conduct is critical.

108. *See* Law Reform Commission of B.C., *Report on Shared Liability* (LRC 88; 1986) at 18. In BC, this principle is codified in the *Negligence Act,* R.S.B.C. 1996, c. 333, s.1.

109. *Hill* v. *Church of Scientology*, [1995] 2 S.C.R. 1130 at 1200. Aggravated and punitive damages will be discussed below.

110. *Athey* v. *Leonati*, (1996) 140 D.L.R. (4th) 235 at 238-239 (S.C.C.) *per* Major, J.

In the case of injuries which are caused by both tortious and non-tortious events, the general rule is that the plaintiff will recover fully from the defendant who committed the tort. According to the Supreme Court,[111]

> Apportionment between tortious and non-tortious causes is contrary to the principles of tort law, because the defendant would escape full liability even though he or she caused or contributed to the plaintiff's entire injuries. The plaintiff would not be adequately compensated, since the plaintiff would not be placed in the position he or she would have been in absent the defendant's negligence.

This approach has been followed in the sexual assault context. In *M.(M.)* v. *F.(R.)*, the BC Court of Appeal held that despite the existence of "other traumatic events" in the plaintiff's life, the sexual abuse of the defendant materially contributed to her injuries, and he was thus liable to compensate her for all of her injuries.[112] In another BC case, it was found that where prior non-tortious events make a plaintiff more vulnerable to being sexually assaulted, again, the defendant is liable to compensate the plaintiff for all of his injuries.[113]

What if the plaintiff's injuries were caused by wrongful acts on the part of more than one person? Where multiple tortious causes combine more or less simultaneously to produce an injury, for example, where two motorists driving negligently cause injury to a passenger in one of the vehicles, "each defendant remains fully liable to the plaintiff for the injury" caused or contributed to. This rule enables the plaintiff to pursue one or more tortfeasor for the full amount of the loss sustained. In other words, the defendants are jointly and severally liable to compensate the plaintiff's injuries. As discussed above, defendants are permitted to seek contribution and indemnity from each other, "according to the degree of responsibility for the injury."[114]

The issues become more complicated where a plaintiff's injuries were caused in part by prior or subsequent wrongful acts on the part of someone other than the defendant, which is often the experience of survivors of sexual abuse. The general principle here is that where the injuries can be separated out, the defendant's responsibility to pay damages relates purely to the injuries caused by his own tortious act. The courts will calculate the damages that flow from the first tortious act as if the second one had not occurred, and then determine the measure of aggravation caused to the plaintiff by the second act.[115] So if one defendant's conduct caused the plaintiff a stiff leg, the plaintiff would be compensated for the permanent effects of that injury. If as a result

111. *Ibid.* at 241.

112. *See M.(M.)* v. *F.(R.)* at paras. 61, 154.

113. *A.(C.)* v. *C.(J.W.)* at 295.

114. *Athey* v. *Leonati* at 240-241. In BC, *see* the *Negligence Act*, ss.1-4.

115. *See* for example *Long* v. *Thiessen,* (1968) 65 W.W.R. 577 (B.C.C.A.).

of a second tortious act the leg was amputated, the second defendant would be liable for additional permanent effects of that more serious injury.

In cases where the plaintiff has suffered sexual abuse at the hands of more than one perpetrator over a period of time, it is likely to be difficult to separate out different aspects of the largely psychological harm sustained by the plaintiff. Moreover, it is often the case that sexual abuse will make a survivor vulnerable to further acts of sexual assault.[116] For a plaintiff who was sexually assaulted prior to the wrongful conduct of the defendant, it is reasonable to assume that the defendant would have taken advantage of the plaintiff's vulnerability, even in a subconscious way. For a plaintiff who was sexually assaulted after the wrongful conduct of the defendant, it is reasonable to assume that the defendant played a role in creating the plaintiff's vulnerability to future abuse.

In these scenarios, the principles of legal causation may come into play. These principles deal with the relationship between the plaintiff's condition before the tort, and the impact of the tort on the plaintiff. According to the thin skull rule of legal causation, where the plaintiff has a pre-existing condition that is triggered by the defendant's actions, a tortfeasor is liable even where the plaintiff's losses are "more dramatic than they would be for the average person," as tortfeasors must take their victims as they find them.[117] Another rule of legal causation relates to plaintiffs with "crumbling" rather than "thin" skulls. This rule applies to situations where the injury caused by the defendant combines with an active weakness or disease of the plaintiff. Here, unlike the thin skull rule, the defendant is only liable for any additional damage to the plaintiff caused by the tort, but not for injuries resulting from the pre-existing condition which, it is assumed, would have resulted in physical deterioration regardless of the defendant's conduct.[118] At the stage of assessing damages, "if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award, especially in relation to actual money losses, such as loss of income."[119] Where the line is drawn between the thin and crumbling skull will not always be easy to determine.

116. In the *E.D.G.* case, the court accepted expert evidence that "the subsequent abuse by other men is directly related to the abuse by [the defendant]. The subsequent abuse was a reaction and a re-enactment of the initial sexual trauma" (at 103).

117. The classic case is *Smith* v. *Leech Brain & Co.,* [1961] 3 All E.R. 1159 (Q.B.).

118. *See Price* v. *Garcha,* (1988) 44 C.C.L.T. 1 (B.C.S.C.), *aff'd* (1989) 2 C.C.L.T. (2d) 265 (B.C.C.A.).

119. *Athey* v. *Leonati* at 243-244.

Traditionally, the thin and crumbling skull rules have been applied where the plaintiff's pre-existing condition was caused by non-tortious events.[120] However, courts have recently applied these rules in cases where the plaintiffs' pre-existing condition was caused by tortious conduct. In these cases, courts have tended to view the effects of past sexual abuse as creating a crumbling skull, resulting in a reduction of damages payable by the defendant.

For example, in *M.B.* v. *B.C.*,[121] a plaintiff claimed damages from her foster parents and the Crown for a single incident of sexual assault perpetrated by the foster father. She had previously been sexually abused over a period of 8 years by her biological father. At trial, the court accepted the Crown's argument that the plaintiff's trauma resulting from the first abuser should be treated as a case of a crumbling skull. However, this finding did not relieve the defendant "of his measure of responsibility for the plaintiff's injuries." The trial judge held that "[the defendant]'s tortious conduct materially contributed to the injuries suffered by the plaintiff. The plaintiff's condition was significantly exacerbated by the repetition of a type of behaviour that could only serve to reinforce a distrustful and flawed view of human relationships."[122] An award of $80,000 in non-pecuniary damages was made at trial.

On appeal, the BC Court of Appeal did not specifically refer to this as a "crumbling skull" case. It quoted from *Athey* in holding that "the defendant is liable for the additional damage but not the pre-existing damage"[123] caused by his sexual assault of the plaintiff. The Court reduced the award for non-pecuniary damages to $30,000, which it found to be a conventional award for single incidents of sexual assault of a similar nature.

In the view of the Committee, the crumbling skull approach to multiple instances of sexual assault is problematic. We believe that those cases where a plaintiff was sexually assaulted prior to the tortious conduct of the defendant are better viewed as thin skull cases. It should not be open for a defendant to avoid paying full damages because the plaintiff's condition prior to the assault in question was caused by a history of sexual abuse by other actors. In these scenarios, not only does the defendant take his victim as he finds her, but he actually exploits the plaintiff's pre-

120. In the sexual assault context *see K.(W.)* v. *Pornbacher*, where the plaintiff had attention deficit hyperactivity disorder and other behavioural and social problems which pre-dated his sexual abuse. At trial, it was held that the prior problems accounted for 25% of the plaintiff's current condition, and damages were reduced by this amount. This case was followed in *T.M.B.* v. *R.R.* (June 30, 2000), New Westminster S049562, where damages were reduced by 30% because the plaintiff "had been made more vulnerable by inappropriate parenting" (at para. 33).

121. (May 3, 2000), Vancouver C970404 (B.C.S.C.). *See also V.(J.L.)* v. *H.(P.)* (February 24, 1997), Vancouver F940728 (B.C.S.C.), where the court found that "the plaintiff possessed significant pre-existing vulnerability factors that likely would have led to personality problems absent any abuse." These included previous emotional and sexual abuse (at para. 136).

122. *Ibid*. at para. 266.

123. *Athey* at para. 35.

existing condition. This is categorically different from the case where the plaintiff's pre-existing condition is not exploited by the defendant, for instance, where the plaintiff already has a tortiously caused leg injury, and the defendant's conduct aggravates it**.** An intentional tortfeasor who takes advantage of a pre-existing condition for his own personal gain should not then be permitted to argue that the existence of this condition relieves him of full responsibility for paying damages.

In cases where the defendant was the first abuser, but seeks to avoid paying full damages on the basis that the plaintiff's injuries were caused in part by subsequent abuse, it can be said that the defendant actually created the "thin skull" condition of the plaintiff, increasing her vulnerability to future sexual violence. Again, it would be unjust to allow the defendant to escape or minimize his liability for the full extent of the plaintiff's injuries in this type of case.[124]

Based on the foregoing, it is the view of the Committee that the proper interpretation of the principles of causation from *Athey* is that where multiple actors have committed sexual assault against a plaintiff, either taking advantage of or increasing the plaintiff's vulnerability to sexual assault, the tortfeasors should be held to have materially contributed to the plaintiff's injuries. Each party who has sexually assaulted the plaintiff should be viewed as liable for 100% of the plaintiff's damages, unless they can persuade a court that in the circumstances the elements of the harm are severable. In our view, it is reasonable to resolve any doubt in favour of the plaintiff, given that liability for sexual assault has been established at this stage. This is in keeping with the deterrence aspect of the tort system, and will promote care being taken not to create, or take advantage of, a plaintiff's vulnerability to sexual assault.

Recommendation # 1

In cases where multiple actors have committed sexual assault against a plaintiff, either taking advantage of or increasing the plaintiff's vulnerability to sexual assault, the tortfeasors should be held to have materially contributed to the plaintiff's injuries unless they can persuade a court that in the circumstances the elements of the harm are severable.

124. This approach was followed in the *E.D.G.* case. The evidence there disclosed that as many as 7 other men had assaulted the plaintiff subsequent to abuse by the defendant school janitor. The B.C.S.C. held that "[a]s long as [the defendant] is part of the cause of the injury, even though his acts alone did not create the injury, his responsibility for the damage that flows from the injury is established." This aspect of the decision was not considered on appeal, as the dismissal of the claim against the school board was upheld, and the perpetrator did not appeal the finding of liability against him. See *E.D.G.* (B.C.C.A.).

So far, we have assumed that the defendants involved in questions of liability for multiple instances of sexual assault are the perpetrators themselves. Should the situation be any different where a defendant other than the perpetrator seeks to excuse or reduce its liability to pay damages for the plaintiff's injuries, where these were caused in part by previous or subsequent tortious conduct? In the case of negligence, it is the Committee's view that joint and several liability should apply along the lines suggested above. The rules of legal causation for negligence emphasize reasonable foreseeability of the context or consequences of one's actions. It may well be anticipated by institutions involved in the care of children or others who are vulnerable that their charges have suffered previous abuse, and will be more susceptible to it in the future if they are abused while in care. In the case of liability based on a breach of fiduciary duty, reasonable foreseeability of damages is not required to hold a defendant fully liable for the plaintiff's injuries.

The answers are more difficult in the case of vicarious liability and breach of non-delegable duty, where liability is strict and related to the circumstances of employment or the duty of the entity to the survivor at the time of the tort. There are two possible ways of viewing the situation in these instances. First, under these doctrines, the employer or Crown might only be liable for the consequences of the tort of its employee or independent contractor, not those of independent abusers. Seen in this light, a court would have to make a determination of the proportion of the harm to the plaintiff caused by the employee or independent contractor, as opposed to other abusers, past or subsequent. The second approach is to recognize that the doctrines of vicarious liability and breach of non-delegable duty require the employer and Crown to stand behind their employees and independent contractors to the full extent of the harm for which the latter are responsible. On this view, if the employee or independent contractor would be liable for the full amount of the harm caused by sexual abuse from whatever source, so would the employer or Crown.

The Committee believes that the second approach is preferable for several reasons. First, and as noted above, it is not an easy task to separate out the relative causation of various actors in the case of psychological injury. Second, the objectives of vicarious liability and breach of non-delegable duty, fair compensation and deterrence, are more realistically met via the second approach. Just as the principles of negligence require that institutions involved in the care of vulnerable individuals take responsibility for those in their care, the principles of vicarious liability and non-delegable duty require that institutions take full responsibility in appropriate cases for the conduct of their employees and independent contractors.

Recommendation # 2

Tortfeasors should be held to have materially contributed to the plaintiff's injuries arising from multiple instances of sexual assault in accordance with Recommendation 1 regardless of their basis of liability.

D. Damages

1. Introduction

Once causation has been established, plaintiffs are entitled to be compensated for their injuries. The governing principle in awarding damages is the compensatory principle, which was originally stated as follows:[125]

> ... in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

Of course, some injuries are easier to fit within this principle than others. The difficulties in assessing compensation for intangible losses have been noted by the courts, scholars, and, more recently, survivors of sexual assault and their advocates.[126] These difficulties lead the Supreme Court of Canada to clearly distinguish between two main types of loss: pecuniary or economic losses, for which the plaintiff is entitled to receive full compensation, and non-pecuniary, or non-economic losses, for which the plaintiff is entitled to receive fair compensation.[127]

In contrast to compensatory damages, punitive damages are awarded to punish the defendant, and to deter the defendant and others from wrongdoing. In addition, or as an alternative to damages available in common law causes of action (assault and battery, negligence, breach of non-delegable duty, and vicarious liability), compensation may be available where a plaintiff's action lies in equity for breach of fiduciary duty, or for a breach of a *Charter* duty. We will now consider the issues arising under each of these heads of damages or compensation.

2. Heads of Damages

(a) Non-pecuniary Damages

(i) Introduction

Non-pecuniary damages seek to compensate plaintiffs for non-economic, intangible losses, such as pain and suffering, loss of amenities, and loss of expectation of life. The Supreme Court has adopted a "functional approach" to assessing non-pecuniary damages, which considers the losses sustained by individual plaintiffs with a view to providing them with "reasonable solace" for their

125. *Livingstone* v. *Rawyards Coal Co.,* (1880) 5 App. Cas. 25 at 39 (H.L.).

126. See Feldthusen et al at 99-100. This point was also raised in our consultations with front line sexual assault workers.

127. *Andrews* v. *Grand & Toy Alberta Ltd.*, (1978) 83 D.L.R. (3d) 452.

misfortunes, while recognizing that money can never truly compensate for their losses.[128] Moreover, non-pecuniary damages are normally assessed globally rather than with reference to the sub-heads of such damages.

It has also been recognized by the Supreme Court that awards for non-pecuniary losses must "of necessity be arbitrary or conventional."[129] The concept of a conventional damage award is critical to this study. A conventional damage award is one which contemplates that "the plaintiff suffers a 'conventional' amount of unhappiness for the injury at hand, necessitating the 'conventional' amount of solace at the 'conventional' cost."[130] Courts will adjust conventional awards in light of a plaintiff's particular circumstances, creating a range of damage awards for similar types of injury. In the following sections, we will canvass the "conventional cost" of providing solace in sexual assault cases.

(ii) Translating Harm into Non-Pecuniary Damages

A. Quantifying the Inherent Harm of Sexual Assault

As noted above, sexual assault results in inherent harm to survivors, including loss of dignity, autonomy, personhood, and equality. Some survivors may also experience inherent harm related to oppression on the basis of their race, culture, spirituality, ability, and sexual identity. The courts have recognized the very serious nature of these harms – they go to the very core of one's being and sense of self worth.

In addition to, and as a result of these inherent harms, individual plaintiffs may experience several consequential effects of sexual assault, including disorders related to moods, sleep, eating, sexuality, personality, interpersonal relationships, child development, learning, and so on. In and of themselves, these are also very serious injuries.

One of the most difficult issues in civil actions for sexual assault is how to translate these inherent harms and consequential injuries into monetary damages. In thinking through these issues, the Committee has considered the following questions. How should the harm that is recognized as inherent be characterized and how should it be compensated in damages? Should the inherent

128. *Andrews* v. *Grand & Toy Alberta Ltd.*, (1978) 83 D.L.R. (3d) 452 at 475-476; *Arnold* v. *Teno,* (1978) 83 D.L.R. (3d) 609; *Thornton* v. *Prince George Board of Education*, (1978) 83 D.L.R. (3d) 480. For a further discussion of the functional approach to damages, *see* B. McLachlin, "What Price Disability? A Perspective on the Law of Damages for Personal Injury" (1981), 59 Can. Bar Rev. 1.

129. *Andrews*, *ibid*. at 476.

130. Cooper Stephenson at 509.

harm of sexual assault be individualized for the purpose of assessing damages, or should all plaintiffs be treated the same? Would a minimum damage award to recognize the harm of sexual assault serve as a useful approach? Should harm be recognized as inherent in all sexual assault cases, or should such a recognition depend on the cause of action?

In many intentional tort cases, such as battery, assault, and false imprisonment, there is no claim of any physical damage. Instead, plaintiffs are compensated for interference with their autonomy, dignity and self-esteem.[131] For example, in *Malette* v. *Shulman*, a woman was awarded $20,000 in non-pecuniary damages for battery after she was given a blood transfusion despite the defendant doctor's knowledge that, as a Jehovah's Witness, she did not consent to this procedure. This award was upheld on appeal, based on the violations of the plaintiff's bodily integrity and right of self-determination.[132] This award, and those in similar cases, are significant because they recognize the inherent harm of the assault or battery, regardless of the absence of consequent or additional injuries. Similarly, cases of libel are actionable without proof of specific injury or loss,[133] given that damage to reputation is seen to be indelible and durable. As we will discuss below, large damage awards have been given in some defamation cases, based in part on an accepted level of inherent harm. This is also true of the intentional tort of false imprisonment.[134] In *Muir* v. *Alberta*, the Alberta Court of Queen's Bench awarded $250,000 in non-pecuniary damages to a woman who was confined in the "Provincial Training School for Mental Defectives" for 10 years, resulting, *inter alia*, in restrictions on her liberty and privacy.[135] In these cases, the very nature of the tortious act is seen to warrant a significant measure of damages.

In the view of the Committee, there is merit in arriving at a measure of damages, that would be adequate to compensate survivors for the harm which is inherent in sexual assault cases. It would then be open to plaintiffs to sue for this amount without having to prove harm – this would be presumed, based upon our understanding of the inherent harms of sexual assault as described by survivors and front line workers, and as confirmed by other cases of assault and battery. If a plaintiff wished to pursue a greater measure of damages, it would be open to her to do so, and the claim would then focus not only on the inherent harm of sexual assault, but on the additional

131. *Malette* v. *Shulman,* (1990) 2 C.C.L.T. (2d) 1 (Ont. C.A.). *See also Mink* v. *University of Chicago,* (1978) 460 F. Supp. 713 (U.S.D.C., Illinois), where the plaintiff was subject to experimental drug testing without his knowledge; *Schweizer* v. *Central Hospital*, (1974) 6 O.R. (2d) 606 (H.C.J.), where the medical treatment was done without the plaintiff's consent; *Stewart* v. *Stonehouse*, [1926] 1 W.W.R. 929 (Sask. C.A.) and *Alcorn* v. *Mitchell,* (1872) 63 Ill. 553 (S.C.), where the plaintiffs were victims of angry or spiteful slights.

132. At 20.

133. Linden, *Canadian Tort Law* at 721.

134. *Ibid.* at 50.

135. *Infra* at 357. In addition to this inherent harm, the court also noted that Ms. Muir was subjected to stigmatization, cruel punishment, and unauthorized drug treatment. Muir was also awarded damages for wrongful sterilization.

injuries resulting from the sexual assault.

We believe this approach is justified for a number of reasons. First, a conventional award recognizing the inherent harm of sexual assault will reinforce the notion that there *is* harm inherent in sexual assault that can be translated into damages. While the notion of harm often has been stated by the courts, they have not followed this up by quantifying the inherent harm into damages. Second, the availability of a conventional damage award for the inherent harm of sexual assault will allow plaintiffs to be compensated without having to present themselves as "damaged," and without having their personal histories examined in detail by the courts. These are concerns which have been raised by survivors, front line workers, and academics alike.[136] Third, a conventional damage award for the inherent harm of sexual assault may assist in avoiding lengthy trials and encourage settlement. In particular, this approach may bypass difficulties in proving causation of consequential injuries where there are multiple tortfeasors over time. Each tortfeasor would be liable to pay damages for the inherent harm of the sexual assault for which the tortfeasor was liable. Lastly, this approach is consonant with cases which recognize and compensate for inherent harm in the areas of assault and battery, defamation and libel, and false imprisonment.

Moreover, there is precedent for a recognition of inherent harm in civil sexual assault cases. In *Jane Doe*, the court noted the "horrific nature of the violation" as distinct from its consequences. In the words of the court,[137]

> rape is unlike any other sort of injury incurred by accident or neglect. Survivors of rape must bear social stigmatization which accident victims do not. Rape is not about sex; it is about anger, it is about power and it is about control. It is, in the words of Dr. Peter Jaffe, "an overwhelming life event." It is a form of violence intended to create terror, to dominate, to control, and to humiliate. It is an act of hostility and aggression. Forced sexual intercourse is inherently violent and profoundly degrading.

In *M.B.* v. *B.C.*, a majority of the B.C.C.A. rejected the Crown's submission that a foster father's sexual assault was *de minimus* in the sense that it added nothing to the plaintiff's injuries, given that she had been previously sexually abused by her biological father. According to Justice Mackenzie,[138]

> That line of argument could lead to the offensive proposition that a victim of severe and psychologically disabling sexual abuse could be further abused with impunity because the damage had

136. Jane Doe raised this concern in her action against the Metro Toronto Police Force. This issue was also raised in the Committee's consultations with front line workers. See also Feldthusen et al at 109-110. In their study, many survivors expressed concerns about individualized damage awards, and believed that "everyone should be treated the same," regardless of the kind of sexual assault they sustained. For an academic perspective, see Sheehy at 218.

137. At 746.

138. *M.B.* v. *B.C.* (B.C.C.A.) at para. 103.

> already been done. It overlooks the violation of the person that is inherent in this intentional tort. This element distinguishes cases of sexual assault from motor vehicle and other similar negligence cases that do not involve similar intentional insults to the person.

A conventional damage award for the inherent harm of sexual assault would have to meet several requirements. It must adequately compensate the plaintiff for the inherent harm of sexual assault, and make it worthwhile to pursue a claim, taking into account the costs of legal representation.[139] It must also be a sum which is fair to defendants, and to society as a whole. This requirement raises the issue of whether the award should differ depending on the basis of the defendant's liability. In the view of the Committee, this would not accord with the compensatory principles of the damages system. Once liability and causation have been established, the focus turns to the plaintiff's injuries rather than the defendant's conduct. Sexual assault results in the same level of inherent harm regardless of whether the defendant's liability is based in assault and battery, negligence, breach of non-delegable duty, or vicarious liability.[140] The defendant's conduct is a matter better dealt with in the context of damages for the consequential injuries of sexual assault, and aggravated and punitive damages. The amount of a conventional damage award for the inherent harm of sexual assault should also be in line with awards in similar cases, which would go some way towards ensuring that the requirements of fairness to plaintiffs and defendants are met.[141] A final requirement is that such an award should not be used to decrease the overall level of compensation in sexual assault cases. We will discuss the range of awards in a following section, but at this stage, it is important to note that what we propose is a damage award to acknowledge the inherent harm in sexual assault cases, not a suggestion that the awards in such cases be downsized.

In the view of the Committee, the courts should establish an award which would meet the requirements noted above. A plaintiff who brings a civil action for sexual assault should be entitled to be compensated for this amount once proof of liability is established, and would have the option of pursuing greater damages for consequential injuries flowing from the assault, or in relation to the defendant's conduct.

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139. The costs of legal representation are discussed below in section E1(c).

140. Inherent harm relating to breach of fiduciary duty and breach of the *Charter* will be discussed below.

141. It may also be appropriate to consider awards made for sexual assault under negotiated or government compensation packages. In these cases, survivors settle for damage awards which are lower than those available through a civil action, in favour of a process which is less adversarial and more rapid. See Law Commission of Canada, *Restoring Dignity* at 306. While some such awards have been criticized as being low, there is in a sense a trade off in terms of the extent to which the survivor will be required to validate her claim.

Where there has been an element of oppression on the basis of race, culture, ability, sexual identity, or other personal characteristics, the Committee is of the view that this should be dealt with as an aspect of aggravated damages, rather than going to differing levels of inherent harm. While there is some merit in recognizing that sexual assault committed in circumstances involving oppression on the basis of personal characteristics may result in a heightened sense of inherent harm, it is our view that this would be difficult to quantify.

Recommendation # 3

Courts in BC should establish a conventional award for damages for the inherent harm of sexual assault, which should be awarded to all plaintiffs upon proof of liability, without need for proof of consequential injuries and regardless of the basis of the defendant's liability.

B. A Maximum Award for Damages in Sexual Assault Cases?

The Supreme Court of Canada has established a "cap" or "rough upper limit" on non-pecuniary damages of $100,000 for personal injury cases (to be adjusted for inflation). The policy reasons for introducing such a cap were discussed in the case of *Hill* v. *Church of Scientology of Toronto*:[142]

> [A]t the time the cap was placed on non-pecuniary damages, their assessment had become a very real problem for the courts and for society as a whole. The damages awarded were varying tremendously not only between the provinces but also between different districts of a province. Perhaps as a result of motor vehicle accidents, the problem arose in the courts every day of every week. The size and disparity of assessments was affecting insurance rates and, thus, the cost of operating motor vehicles and, indeed, businesses of all kinds throughout the land.

In *Hill,* the Supreme Court held that these policy considerations did not apply in the context of a claim for defamation; hence, the cap was not applied.

In the sexual assault context, the BC Court of Appeal in *Yeo* v. *Carver* followed the reasoning in *Hill* in holding that the cap for non-pecuniary damages should not apply to the intentional tort of assault and battery.[143] The Court noted that "[i]nsofar as damage awards may be so high as to be wholly erroneous, or wholly disproportionate, an appellate court may intervene to correct disparity, and to foster consistency." Moreover,

> In some cases, sexual abuse victims may require and deserve more than the "cap" allows, due to the unpredictable impact of the tort on their lives. Judges, juries and appellate courts are in a position to

142. At 1197.

143. (1996) 26 B.C.L.R. (3d) 155 at 166 (C.A.) (emphasis added). The case is cited as *Y.(S.)* v. *C.(F.G.).* We have chosen to include the full names of the parties in this case, as this is the plaintiff's preference. A publication ban was not requested or made in the case, and the decision to use initials appears to be an editorial one.

decide what is fair and reasonable to both parties according to the circumstances of the case.

In contrast, courts in many other Canadian jurisdictions have applied the cap on non-pecuniary damages either expressly[144] or implicitly in actions for assault and battery in the sexual assault context.[145]

In the view of the Committee, the reasoning of the BC Court of Appeal in the *Yeo* v. *Carver* case is to be preferred. This approach correctly recognizes the different nature of the injuries involved,[146] as well as the need for compensation beyond the level of the cap in many such cases. In *Yeo*, the Court was also persuaded not to introduce a cap on the basis that the policy considerations in sexual assault cases were different from those arising in cases of catastrophic personal injuries, as in the former cases there was no evidence of an impact on the public purse. While this may no longer be accurate, given the large number of sexual assault claims against governments and other institutions, we believe that the other factors noted in *Yeo* still mitigate against the imposition of a cap on damages in sexual assault cases. Moreover, any concern about the public cost of sexual assault cases is offset by the fact that such costs will decrease over time, as knowledge of sexual assault continues to grow and institutions change their policies and practices to avoid or minimize future liability. The same cannot be said about motor vehicle accidents.

This leads to the question of whether the cap on non-pecuniary damages should apply where a defendant's liability is based in negligence, breach of non-delegable duty, or vicarious liability, as opposed to the tort of assault and battery, which was at issue in the *Yeo* case.[147] There have been no decisions to date on this issue.

In the view of the Committee, the cap should not apply in sexual assault cases regardless of the basis of the defendant's liability. This conclusion is in keeping with the restitutionary principle of the damages system, where the goal is to fully compensate the plaintiff for her injuries, regardless of whether the conduct of the defendant was intentional or unintentional. We believe this should be so even in light of the arguments of some commentators that the number of sexual

144. *See A.(D.A.)* v. *B.(D.K.)*, [1995] O.J. 3901, 27 C.C.L.T. (2d) 256 (Ont. Gen. Div.) and *B.(P.)* v. *B.(W.)*, (1992) 11 O.R. (3d) 161 (Gen. Div.), as cited in *Yeo* v. *Carver* at 170. *See also Brandner* v. *Brandner,* (1991) 71 Man. R. (2d) 265 (Q.B.); *B.(A.)* v. *J.(I.)*, [1991] 5 W.W.R. 748 (Alta. Q.B.).

145. *See* for example *C.(S.L.)* v. *M.(M.J.)*, (1996) 179 A.R. 200 (Q.B.). In a Saskatchewan case, it was held that the trilogy principles relating to the quantification of damages are not applicable in the sexual assault context. Still, by surveying cases where the cap was applied to arrive at an appropriate figure for damages, the court effectively applied a cap. *See P.(S.)* v. *K.(F.),* (1996) 32 C.C.L.T. (2d) 250 at 256 (Sask. Q.B.).

146. Sexual assault involves intentional conduct, often committed over a period of time, as opposed to being a single "accident," as is the case with most personal injury cases.

147. There is no cap on equitable compensation in cases where there is a breach of fiduciary duty.

assault claims, and the quantum of damages in such cases, is multiplying rapidly, and may represent a substantial threat to the financial viability of particular institutional defendants. While some defendants, such as the Crown and non-profit organizations, may have to pass on to the public the cost of sometimes high awards, this is required in light of our collective social responsibility for the harms of sexual assault. That individual plaintiffs should not be deprived of adequate and proper compensation for their injuries because the conduct of the defendant was unintentional also fulfills the deterrent aspects of the tort system. The imposition of an upper limit for negligence claims in the context of sexual assault might encourage defendants to treat damage awards as "the cost of doing business" rather than to ensure that they have policies and procedures in place to help prevent sexual assault.

In 1984, the Law Reform Commission of BC recommended that the cap on non-pecuniary damages should be abolished, given "the practical and theoretical problems engendered by the current upper limit." According to the Commission, "[a]ppellate review will quickly restore certainty to assessing damages for non-pecuniary loss and we expect that, in short order, general ranges of compensation for particular kinds of injuries will be established."[148] We agree.

Recommendation # 4

The cap on non-pecuniary damages should not apply in sexual assault cases, regardless of the basis of the defendant's liability.

C. Benchmarks for Damages in Sexual Assault Cases

As noted above, even if a conventional damage award for the inherent harm of sexual assault was to be implemented, there will be continue to be cases where a plaintiff wishes to establish the full extent of her injuries, and to be compensated fully for these injuries. In this section, we will review the range of and the existence of guidelines for damage awards in sexual assault cases. As in our Working Paper, we find it useful to consider awards for childhood sexual assault and sexual assaults against adults separately. There remains a lack of guidelines for damage awards for adults who are sexually assaulted, which arguably results in awards which do not adequately reflect the plaintiffs' losses.

We have been guided by a number of questions in developing this section of the report. What is the appropriate range of non-pecuniary damages for sexual assault? How do, and how should, sexual assault cases compare to other forms of physical and psychological harm, and to one another? Is there sufficient guidance as to the range and the factors to be taken into account?

148. Law Reform Commission of British Columbia, *Report on Compensation for Non-Pecuniary Loss* (LRC 76; 1984) at 31.

1. Childhood Sexual Assault

The Supreme Court of Canada has yet to rule on the principles applying to the quantification of harm in cases of childhood sexual abuse. The leading case on damages for childhood sexual assault in BC is *Yeo* v. *Carver*. In this case, the BC Court of Appeal reviewed a number of damage awards in previous cases of sexual assault, and noted that the cases[149]

> exemplify the difficulty of giving solace or satisfaction to a person who has been abused by one he or she was entitled to trust, and who may suffer from the impact of that abuse for years to come. What amount of money is sufficient as a substitute for lost pleasures and amenities, and as compensation for what yet remains to be suffered? Prior to 1990 a respected judge thought $40,000 to be sufficient. Within about five years other judges of the same Court thought $80,000 - $85,000 to be fair. Now awards by judges appear to range from about $100,000 to $175,000.
>
> ...
>
> Comparison with the awards made in similar cases is helpful in maintaining consistency, and therefore giving fair and equivalent treatment to all victims. But the impact on individuals in particular circumstances of sexual abuse is so difficult to measure that other cases can only provide a rough guide for assessment in this case.
>
> *Critical to any assessment is the view which the trier of facts takes of aggravating features.*

The Court of Appeal went on to note some of the factors which should be considered in fine tuning the award for damages: the presence of a trust relationship between the plaintiff and defendant, a defendant's lack of remorse, the number of assaults, the plaintiff's age when they occurred, the frequency and duration of the abuse, the degree of violence and coercion used, the nature of the abuse, and the physical pain and mental suffering associated with the abuse. In the end result, the jury's award of $350,000 for non-pecuniary damages was found to be "wholly out of proportion" to what ought to have been awarded, and the Court of Appeal substituted an award of $250,000.[150]

While the Court did not explicitly state that it was elucidating a conventional damage award, later cases have suggested that *Yeo* v. *Carver* set a benchmark for damages in cases of childhood sexual assault.[151] Subsequent lower court decisions, while not using the "benchmark" terminology, all consider the case in deciding on appropriate levels of damages.[152] Lower court

149. At 170-172 (emphasis added).

150. At 173.

151. In *M.(M.)* v. *F.(R.)* at 53, Donald, J.A., in dissent on the appropriate quantum of damages, stated that *Yeo* sets a "benchmark for assessing damages in cases of prolonged sexual abuse of children causing severe psychological damage." The majority, *per* Esson, J.A., refrained from calling the case a "benchmark," noting only that it did not require that the award for general damages in *M.(M.)* v. *F.(R.)* be increased (at 154).

152. In *A.B.* v. *T.S.* (June 23, 2000), New Westminster S040299, the court opined that the *Yeo* case had "shifted the goal post" for damages in cases of childhood sexual assault (at para. 40).

decisions also expand upon the list of factors which should be taken into account in finetuning damage awards, including the impact of the abuse on a plaintiff's gender identity, a plaintiff's vulnerability at the time of the abuse,[153] the presence of multiple forms of abuse – physical, emotional, and sexual,[154] and the transmission of a sexually transmitted disease to the plaintiff.[155]

Another factor significant in assessing damages in sexual assault cases is whether the defendant has apologized to the plaintiff. A sincere apology at an early stage in the proceedings may have beneficial effects on survivors, and their consequential injuries.[156]

The *Libel and Slander Act* provides for mitigation, or reduction of damages, where the defendant apologizes or offers an apology for the libel or defamation, even where liability is not admitted.[157] We believe that an analogous approach is appropriate in sexual assault cases, and that judges should consider the presence of a sincere apology, one that is a sign of respect or remorse, as a mitigating factor in sexual assault cases.

Apologies from institutional actors may be particularly important to survivors of sexual assault, as they establish an acknowledgment of injuries at a systemic level. On the other hand, it appears that apologies are not seen as an option by some defendants, given their view that this may be considered an admission of liability. This has led to some cases where an apology is coupled with a vigorous defence, rendering the apology virtually meaningless to the survivor. In our view, a vigorous defence would normally negate the mitigating aspects of an apology.

153. *(A.)C.* v. *C.(J.W.)* at 292, 295 (B.C.S.C.). This aspect of the trial decision was not affected by the appeal. Vulnerability was also cited as an important factor in *K(W.)* v. *Pornbacher* at 383.

154. *T.(L.)* v. *T.(R.W.)* at paras. 7, 12.

155. *P.A.C.* v. *J.C.T.* (7 May 1998), Courtenay S3229 (B.C.S.C.); *P.* v. *F.* (1996), 24 B.C.L.R. (3d) 105 at 112 (S.C.).

156. *See* Feldthusen et al at 75. The authors recommended that more non-monetary support benefits be made available to survivors, including "humble, sincere apologies" (at 111). *See also Muir*, where Veit J. noted that "[a]s a matter of policy, government apologies and initiatives of this sort to redress historical wrongs should be encouraged ..." (at 326). The defendant admitted liability in the case despite the availability of a limitations defence.

157. R.S.B.C. 1996, c. 263, s. 10.

Another factor which should be considered in fine-tuning damages, and one related to the victim's vulnerability, is whether the sexual assault was committed in circumstances of oppression on the basis of race, culture, ability, class, sexual identity, or other personal characteristics. To date, the courts have not given particular attention to this factor.[158] However, as noted above, this type of oppression can compound the inherent harm suffered by survivors of sexual assault, and the consequential injuries flowing from sexual assault.

Not only may the presence of oppression on the basis of disadvantage serve to compound the harm in sexual assault cases, it may create unique forms of compensable injury. For example, in the case of Aboriginal survivors of sexual assault, cultural loss may be a relevant form of injury. While this type of loss has not yet been considered in the sexual assault context,[159] it has been addressed in other situations. Cultural losses may include the loss of cultural or hereditary rights as a result of the injuries sustained, and may require that certain activities take place in order to restore the plaintiff to her former place in the community. To date, the courts have taken these losses into account as an aspect of non-pecuniary damages,[160] or, where certain expenditures were required, as a matter of pecuniary damages.[161]

158. For example, Sheehy has noted that damage awards often neglect to identify the ways in which racism may contribute to the harm of sexual assault (at 218-219). Sheehy cites *Myers* v. *Haroldson*, [1989] 3 W.W.R. 604 (Sask. Q.B.), where the judge failed to comment on the fact that the plaintiff was called a "squaw" by her assailant, and *Jane Doe* v. *Awasis Agency of Northern Manitoba*, (1990) 72 D.L.R. (4th) 738 (Man. Q.B.), where the court failed to recognize "the impact of racially motivated state intervention, loss of familial and community relations, and damage to her pride in her Aboriginal heritage." In BC, see *Glendale* and *E.D.G.* (B.C.S.C.), where the cultural heritage of the victim was mentioned in passing, and *M.(M.)* v. *F.(R.)*, where the Aboriginal heritage of the victim was not mentioned at all.

159. There have been no judicial decisions to date dealing with cultural losses of survivors of First Nations residential schools, although there are cases currently before the courts in BC.

160. *See Gawa* v. *Horton and Wilson*, (1981) 37 B.C.L.R. 130 at 138 (S.C.). In this case, the plaintiff sustained a severe head injury and brain damage after a motor vehicle accident. The court held that the plaintiff's loss of status as a Gitksan chief, a result of her injuries, should be considered a loss of amenities, and thus an aspect of non-pecuniary damages.

161. *See Williams* v. *Mould*, [1991] 3 C.N.L.R. 186 at 187 (B.C.S.C.). In this case, the court awarded compensation to the deceased's widow for the cost of erecting a headstone, which was found to have "significant cultural and hereditary factors," and to be a matter of obligation rather than a matter of sentiment. The deceased had been the high chief of the Fireweed Clan, and died as a result of injuries sustained in a motor vehicle accident.

The gender of a sexual assault victim may also be an important factor in assessing damages. It is apparent that non-pecuniary damage awards for male survivors of childhood sexual assault have tended towards the low end of the range.[162] These cases suggest that more awareness may be required in assessing what level of harm is experienced by male survivors of abuse. The BC Task Force on Family Violence, in its 1992 report, stated as follows:[163]

> While society has a great deal of empathy for very young male victims, it is generally intolerant of boys who are victimized later in childhood. Homophobic attitudes and a common misperception that male abusers of boys are homosexual and that male victims will be "tainted" by their abuse, also contribute to a negative societal attitude to the sexual victimization of boys.

The Task Force also noted that male survivors commonly experience unique injuries in relation to
sexual abuse: homophobia, avoidance of males, hypermasculine and over-aggressive relations to females, and gender identity confusion.[164]

It has been suggested that courts have a perception of the "typical" sexual assault victim as a young, white, able-bodied, virtuous female who has been damaged by the assault.[165] Plaintiffs who
stray from this model, whether by gender, race, culture, ability, sexual identity, strength of character, or personality may find that their harm is more difficult for courts to reconcile with that in the more conventional cases. We conclude that greater awareness is required of the many faces of harm in sexual assault cases.

A related issue is what type of evidence will assist courts in conceptualizing a plaintiff's losses, and in quantifying non-pecuniary damages beyond the minimum level of damages required to compensate inherent harm. There has been some debate in the academic literature as to the

162. *See* for example *A.(C.)* v. *C.(J.W.)*, where four male plaintiffs sexually assaulted by the operator of a youth ranch in the 1970s were awarded non-pecuniary damages of $50,000 to $75,000. In *K.(W.)* v. *Pornbacher*, $40,000 non-pecuniary damages were awarded to the plaintiff for several incidents of fondling at the hands of his parish priest. In the case of *McCulloch* v. *Green* (January 8, 1996), Vancouver C932295 (B.C.S.C.), twin brothers were each awarded $35,000 non-pecuniary damages for several incidents of sexual assault by their baseball coach over a 3 to 4 year period. In assessing damages, the court noted that the plaintiffs were vulnerable, but "[t]here was no oral or anal sex, nor was there any use of force or threats" (at para. 57).

163. BC Task Force on Family Violence at 142-143 (cites omitted).

164. *Ibid.* at 143.

165. *Ibid.* at 115. *See also* M. Nightingale, "Judicial Attitudes and Differential Treatment: Native Women in Sexual Assault Cases" (1991) 23 Ottawa L. Rev. 71, who found that sexual assaults against Aboriginal women who were intoxicated were treated less seriously by the courts. While her study reviewed perceptions of sexual assault victims in the context of criminal trials, it is apposite to the civil context as well.

propriety of relying on expert evidence in this regard.[166] The Committee is of the view that there is an important role for expert evidence in sexual assault cases, considering that denial may be a common coping mechanism for sexual assault survivors, relating to both the abuse itself and its impact on their lives. Language, culture, and class may also undermine survivors' abilities to describe their experiences and injuries in a way that judges or juries can understand. At the same time, it will be critical in most cases for the court to hear from the plaintiff in his or her own words. This does not mean, however, that a survivor should be expected to present as "damaged" in every way. Many survivors maintain a strength of character that should not be seen as undermining the level of injuries which they have sustained. Again, this is an area where greater awareness is required of the many faces of harm in sexual assault cases.

In conclusion, the Committee is of the view that it would be useful for the courts, and in particular, the BC Court of Appeal, to clarify the import of the *Yeo* v. *Carver* decision. While the case does not say so explicitly, it has the attributes of a benchmark case, as it sets an appropriate conventional award, and enumerates many of the factors to be considered in finetuning the award. We believe it will be of assistance to lower courts in BC to have the case explicitly recognized as a benchmark, as this will bring a measure of certainty to damage awards for childhood sexual assault in this province.

The Committee also believes that training programs should be made available to judges on the inherent harm and consequential injuries flowing from sexual assault. Indeed, we found it very useful to have the participation of a psychiatric expert in this area on our Committee, and, through our consultations, to obtain the wisdom and insights of those working with survivors of sexual assault.

Recommendation # 5

***Yeo* v. *Carver* should be treated as a conventional damage award for cases of childhood sexual assault in BC. To the list of factors enumerated in *Yeo* as relevant to finetuning the award should be added the following: the presence of a sincere apology by the defendant; the impact of the abuse on the plaintiff's gender identity; the plaintiffs' vulnerability at the time of the abuse; the presence of multiple forms of abuse; and whether the sexual assault was committed in circumstances of oppression on the basis of sex, race, culture, ability, class, sexual identity, or other personal characteristics.**

166. *See* N. Tellier, "Limitation Periods and the Assessment of Damages in Civil Sexual Assault," in *Civil Liability for Sexual Assault in an Institutional Setting* (Toronto: Canadian Institute Publications, 1995) at 50; K. Sutherland, "Measuring Pain: Quantifying Damages in Civil Suits for Sexual Assault," in K. Cooper-Stephenson and E. Gibson, eds., *Tort Theory* (North York, Ontario: Captus Press, 1993) 212 at 214; Sheehy at 218.

Recommendation # 6

The Canadian Judicial Council, the Canadian Institute for the Administration of Justice, and provincial and territorial chief justices should create and deliver training programs for judges on the inherent harm and consequent injuries in sexual assault cases, including the compounded and unique nature of harm which flows from the plaintiff's gender, race, culture, ability, class, sexual identity, or other personal characteristics, as well as the diversity of ways in which plaintiffs may present as survivors of sexual assault.

2. Adult Victims of Sexual Assault

There is no case analogous to *Yeo* v. *Carver* in the case of adult victims of sexual assault. *Norberg* v. *Wynrib*, an early leading case of the Supreme Court of Canada on liability for sexual assault, was not intended to set a conventional award for damages, and in fact the Supreme Court did not purport to do so in the case. In spite of this context, *Norberg* has been used as a precedent for damages by lower courts, leading to low damage awards for adult victims of sexual assault, most of whom are women.

The leading case in BC on damages for an adult victim of sexual assault is *Glendale* v. *Drozdzik*. In this case, the trial judge awarded the plaintiff $15,000 non-pecuniary damages after she was sexually assaulted by a man with whom she had gone out on a date.[167] On appeal, the B.C. Court of Appeal held that "the principal guidance must now be obtained from the Supreme Court of Canada in *Norberg* v. *Wynrib*," and substituted an award of $25,000 for non-pecuniary damages.[168]

While the *Glendale* case has been cited as a precedent in other cases of sexual assault involving adult victims, it does not have the attributes of a benchmark case discussed above. First, *Glendale* relied on a problematic precedent in setting the quantum of damages.[169] Second, the award in *Glendale* was made while the cap on non-pecuniary damages still applied to sexual assault cases, a factor which may have tended to lower the overall level of the award. Subsequent to the *Yeo* case, the award in *Glendale* is markedly low. Third, the Court in *Glendale* did not establish a comprehensive list of factors to be considered in fine-tuning non-pecuniary damage awards for adult victims of sexual assault.

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167. [1990] B.C.W.L.D. 1839. The plaintiff suffered from post-traumatic stress syndrome, becoming withdrawn, reclusive, and alienated from her family, and experiencing insomnia and nightmares.

168. (1993) 77 B.C.L.R. (2d) 106 at 112-113 (C.A.) *per* Lambert, J.A.

169. As noted above, *Norberg* was not a case about damages. Moreover, the trial decision in *Glendale* was one of the cases relied on by the Supreme Court of Canada in determining an appropriate award in *Norberg*, thus perpetuating the low award for damages.

In Ontario, higher awards have been made for adult victims of sexual assault. In *S.(J.)* v. *Clement*, a woman was awarded $90,000 non-pecuniary damages for injuries sustained after she was beaten and sexually assaulted by a dangerous sexual offender who had escaped from a prison near her home.[170] While this award is at first glance high for an adult victim of sexual assault, it may still be less than fully compensatory, given the level of violence and consequential injuries sustained by the plaintiff, and compared with awards made for injuries flowing from other serious tortious acts. In the *Jane Doe* case, the plaintiff was awarded $175,000 in non-pecuniary damages in an action based on the negligence and breach of *Charter* duties of the police in failing to protect her from a serial rapist in her community. In quantifying damages, the court held that "damage awards in the $40-50,000 range are reflective of neither the horrific nature of the violation nor of the overwhelming and all-encompassing consequences of it."[171]

In BC, awards in cases involving adult victims of sexual assault continue to be in the low range. For example, in *M.(T.D.)* v. *G.(K.S.)*, damages of $18,000 were awarded to a plaintiff sexually assaulted by her boyfriend's friend in the backseat of a car while the boyfriend drove.[172] In *Lawson and Hess* v. *Ambrose*, a plaintiff was found to have undergone "a night of terror, believing the whole time that she was in very grave danger of being killed." The court awarded $35,000 general damages for this "vicious, degrading and humiliating sexual attack," which was found to have resulted in long term psychological and emotional harm.[173]

In contrast, the awards made to plaintiffs in the case of other intentional torts tend to be much higher. For example, the Alberta Court of Queen's Bench awarded $500,000 for wrongful sterilization and wrongful confinement in the case of *Muir* v. *Alberta*.[174] The case involved circumstances where the plaintiff was resident at the "Provincial Training School for Mental Defectives" in the 1950s, and was irreversibly sterilized at age 14. The physical and emotional damage inflicted upon the plaintiff was said by the court to be "catastrophic": "it changed, warped and haunted her life."[175] Veit, J. awarded $250,000 each for the sterilization and the confinement, finding that these amounts were consistent with awards for damages in similar cases.

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170. (1995) 22 O.R. (3d) 495 (Gen. Div.) The sex offender (in assault and battery) and Correctional Services Canada (in negligence) were held jointly and severally liable for these damages.

171. At 746-747.

172. (November 10, 1997), Vancouver C961248 (B.C.S.C.). The sexual assault comprised digital penetration of the plaintiff and forced oral sex, resulting in injuries including depression, fear, nightmares, anxiety, stress, and thoughts of suicide.

173. (February 22, 2000), Port Alberni 6044 (B.C.S.C.) at para. 37.

174. (1996) 179 A.R. 321 at 350 (Q.B.).

175. *Ibid.*.

In the defamation context, the Supreme Court of Canada upheld an award of $300,000 for non-pecuniary damages in *Hill* v. *Church of Scientology*. The case involved a Crown attorney against whom specious contempt of court proceedings were brought, and publicized by the defendants. The harm sustained by the plaintiff was described as follows:[176]

> For all lawyers their reputation is of paramount importance. ... Anything that leads to the tarnishing of a professional reputation can be disastrous for a lawyer. ... This nagging doubt and sense of hurt must have affected him in every telephone call he made and received in the course of his daily work, in every letter he sent and received and in every appearance he made before the courts. ...

It must be said that this passage describes injuries far less serious than those inherent in sexual assault cases, yet which were compensated at a much higher level than is typical in sexual assault cases. Given the disparity between the awards for adult victims of sexual assault, and those recently made in cases of childhood sexual abuse and other intentional tort cases, we conclude that there is need for a benchmark case which establishes a conventional damage award for adult victims of sexual assault. Such an award should be in line with those made to victims of other intentional torts involving serious inherent injury. Moreover, it should recognize that many of the factors relevant in cases of childhood sexual assault will be relevant to establishing damages for consequential injuries in cases involving adult victims, although there may be other factors that come into play uniquely in the latter area.

Recommendation # 7

The BC Court of Appeal should, in an appropriate case, establish a benchmark for damages for adult victims of sexual assault. The benchmark should include an appropriate conventional award for damages which recognizes the inherent harm of sexual assault, along with the factors which would be relevant to establishing damages for consequential injuries in the circumstances of individual cases.

We recommend that the following factors be considered relevant to consequential injuries: presence of a trust relationship between the plaintiff and defendant; whether the assault occurred in the plaintiff's home; the plaintiff's vulnerability to the assault; the defendant's lack of remorse; the presence of a sincere apology by the defendant; the nature of the assault; the frequency and duration of the assault(s); the degree of violence and coercion used, including the use of a weapon or threats; the physical pain and mental suffering associated with the assault; and whether the sexual assault was committed in circumstances

176. At 1200. The Court also upheld the jury's awards of $500,000 for aggravated damages, and $800,000 for punitive damages. *See* Huscroft, "Defamation, Damages and Freedom of Expression in Canada" (1996), 112 L. Q. Rev. 46, who notes that *Hill* "should have been a strong case for reviewing the quantum of damages awarded. For despite the defendants' flagrant misconduct, the plaintiff had not been appreciably harmed" (at 49). The contempt charge against the plaintiff was dismissed, and he was later promoted, elected a bencher, and appointed a judge.

of oppression on the basis of gender, race, culture, ability, class, sexual identity, or other personal characteristics.

3. Basis of Liability

As noted above, in the *Jane Doe* case, the plaintiff was awarded $175,000 in non-pecuniary damages in an action based on the negligence and breach of *Charter* duties of the police in failing to protect her from a serial rapist in her community. This represents the highest award for damages in a case involving an adult victim of sexual assault to date. Interestingly, the award for negligence is much higher than those in cases involving intentional torts.

This squarely raises the issue of whether the basis of the defendant's liability should make a difference in quantifying non-pecuniary damages in sexual assault cases. In the view of the Committee, the basis of liability should be seen as irrelevant to the assessment of what measure of damages would be sufficient to compensate the plaintiff's inherent and consequential injuries. Several academic commentators have noted that the conduct of the defendant should not be the governing factor in assessing non-pecuniary damages in sexual assault cases.[177] We agree. While the conduct of the defendant may be one relevant factor to consider in making this determination, to allow the defendant's basis of liability to alter the measure of non-pecuniary damages in itself would not be in keeping with the compensatory principle. In our view, the defendant's conduct, including the basis of liability, is better dealt with under the heads of aggravated and punitive damages, which we will discuss below.

Recommendation # 8

The defendant's basis of liability should not be the governing factor in assessing non-pecuniary damages in sexual assault cases. A conventional award for damages should apply regardless of the basis of the defendant's liability.

(iii) Aggravated Damages

A. Quantification

The purpose and scope of aggravated damages have been described by the Supreme Court of Canada as follows:[178]

177. *See* Sutherland at 213; N. Des Rosiers, "Childhood Sexual Assault - Will There Be A Meaningful Civil Remedy?: *Gray* v. *Reeves,*" (1992) 10 C.C.L.T. (2d) 86 at 99.

178. *Hill* v. *Church of Scientology* at 1205-6 (emphasis added).

> Aggravated damages may be awarded in circumstances where the defendant's conduct has been particularly high-handed or oppressive, thereby increasing the plaintiff's humiliation and anxiety ... These damages take into account the additional harm caused to the plaintiff's feelings by the defendant's outrageous and malicious conduct. Like general or special damages, they are compensatory in nature. Their assessment requires consideration by the jury of the entire conduct of the defendant ... through to the conclusion of the trial. They represent the expression of natural indignation of right-thinking people arising from the malicious conduct of the defendant.

Aggravated damages are often awarded in cases involving intentional conduct, such as sexual assault. They are less common in relation to unintentional torts, such as negligence. Further, aggravated damages are not normally the subject of joint liability, as this type of damages relates to the conduct of a particular defendant.[179] The types of injured feelings which have given rise to aggravated damages include "humiliation, indignity, degradation, shame, indignation, and fear of repetition."[180]

Aggravated damages may be assessed globally as part of non-pecuniary damages, or as a separate quantum of damages. In *Norberg*, a majority of the Supreme Court stated:[181]

> Aggravated damages may be awarded if the battery has occurred in humiliating or undignified circumstances. These damages are not awarded in addition to general damages. Rather, general damages are assessed taking into account any aggravating features of the case and to that extent increasing the amount awarded.

Lower courts in BC have been divided as to whether aggravated damages should be quantified separately. Some courts have acknowledged the difficulty in making a principled distinction between general and aggravated damages.[182] Others have dealt with aggravated damages as a separate head of compensation to distinguish the aggravated portion of the award from the general.[183] The latter approach has also been taken by courts in other jurisdictions, although some of these cases pre-date *Norberg*.[184]

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179. *Ibid.* at 1200.

180. Cooper-Stephenson at 527.

181. At 263 (cites omitted, emphasis added).

182. In *H.(S.)* v. *L.(R.G.)*, (1993) 85 B.C.L.R. (2d) 232 (S.C.), Preston, J. noted that child sexual abuse is "in all cases, an act of the most aggravated nature." He awarded $100,000 for general damages, including a component for aggravated damages. *See also Beaudry* v. *Hackett*; *K.(W.)* v. *Pornbacher; McCulloch* v. *Green; E.D.G.* (B.C.S.C.); and *M.(J.V.L.)* v. *H.(P.),* (1997) 31 B.C.L.R. (3d) 155 (S.C.), *aff'd* on this point (1998) 109 B.C.A.C. 165 at para. 14 where aggravated damages were included as part of the general damage awards.

183. *See P.* v. *F.,* where the court set aggravated damages at $20,000, in addition to the $125,000 awarded for general non-pecuniary damages (at 113).

184. *See* for example *B.(A.)* v. *J.(I.),* where $10,000 in aggravated damages was awarded to each of three plaintiffs for the sexual abuse of their stepfather, in addition to $65,000 each for general non-pecuniary damages. In *B.(P.)* v. *B.(W.)*, (1992) 11 O.R. (3d) 161 (Gen. Div.), $75,000 for aggravated damages as awarded to the plaintiff for the "gross breach of trust" of her father's incestuous abuse. This was in addition to an award of $100,000 for general damages.

In the *Yeo* case, the BC Court of Appeal followed the *Norberg* approach to aggravated damages. According to the court:[185]

> [G]eneral damages in most cases are assessed taking into account any aggravating features of the case. Those aggravating features may increase the amount awarded.... In my opinion aggravated damages are not a separate head of damages. They are a part of general damages. Juries ought not to be instructed as if they are a separate category of damages, particularly in cases of sexual abuse where it is difficult to separate the physical harm, which is often of much less significance than the fright, misery and humiliation connected with it, and the continuing mental suffering from it.

Thus in *Yeo,* the award of $250,000 for non-pecuniary damages included a component for the aggravated features of the assault, including the defendant's position of trust vis-à-vis the plaintiff, his lack of remorse, and the prolonged and serious nature of the abuse.

In *A.(C.)* v. *C.(J.W.)*, the Crown was held jointly liable for the general damages awarded to the plaintiffs, including aggravated damages. While the trial judge noted the general rule from *Hill* that
joint liability is not normally imposed for aggravated damages, she found that the Crown was responsible for all of the harm caused by the perpetrator of the abuse, and should thus be held liable for aggravated damages.[186] The Crown's liability for the aggravated component of general damages was upheld on appeal, as the Court of Appeal found that it was "not feasible" to separate out the different aspects of the compensatory award.[187]

This case underlines some of the difficulties with including aggravated damages as an aspect of non-pecuniary damages. Where the perpetrator and another defendant are jointly liable for the sexual assault, separating out the aggravated portion of the award would more readily allow the former, but not the latter, to be held liable for aggravated damages. On the other hand, there may be circumstances where defendants whose conduct is unintentional should be held liable for aggravated damages, but this should be assessed separately for each defendant.

In the damages trilogy, the Supreme Court of Canada pronounced upon the importance of itemizing damage awards. Such itemization provides greater precision, and assists counsel in constructing their claims. Moreover, itemization may be important where there are multiple defendants, who may be liable on different bases, and for different levels of damages. Lastly,

185. At 168 (emphasis added).

186. At 309. Each of the plaintiffs was granted a further award of $20,000 in aggravated damages. *See also K.(W.)* v. *Pornbacher*, in which aggravated damages were included in the general damages assessed against both the perpetrator and institutional defendant.

187. *A.(C.)* v. *C.(J.W.)* at para. 123. The Court of Appeal did overturn an additional award of aggravated damages made at trial against the Crown, as this award was seen to be more in the nature of punitive damages (at para. 127-128).

itemization would allow appeal courts to review damage awards with greater precision.[188] Given these concerns, and the overall difficulty in assessing damages in sexual assault cases, the Committee is of the view that it would be useful for aggravated damages to be assessed separately from general non-pecuniary damages.

Recommendation # 9

Aggravated damages should be assessed separately from general non-pecuniary damages in sexual assault cases. The conduct of each defendant should be assessed separately, with no absolute bar against aggravated damages where the defendant's conduct amounts to an unintentional tort.

B. Factors

In Recommendations 5 and 7, we set out the factors which are relevant to the assessment of consequential injuries in sexual assault cases involving children and adults, respectively. Many of these factors will also be relevant to an assessment of whether aggravated damages should be awarded, as has been recognized by the courts. Other relevant factors focus more on the nature of the defendant's conduct during and after the sexual assaults. For example, it may be appropriate to award aggravated damages where the defendant disclosed the abuse to third parties, or misrepresented the nature of the abuse to others. In the case of government defendants, ignoring legislative requirements and guidelines may also be seen to warrant aggravated damages.[189] In subsequent sections of this report, we argue that breach of fiduciary duty and breach of the *Charter* are also relevant to the assessment of aggravated damages.

There is another important factor relevant to aggravated damages that the courts have not been quick to recognize. As noted above, where there has been an element of victimization or oppression on the basis of gender, race, culture, ability, class, sexual identity, or other personal characteristics, the Committee is of the view that this should be dealt with as an aspect of aggravated damages. This type of conduct is clearly "high-handed or oppressive," and results in "humiliation, indignity, degradation, shame, indignation, and fear of repetition." Moreover, courts are bound to apply *Charter* values in developing the common law. A recognition that sexual assault committed in circumstances involving oppression on the basis of personal characteristics results in a heightened sense of injuries is in keeping with the *Charter* value of equality.

188. *See* Cooper-Stephenson at 529.

189. *See* Grace and Vella (2000) at 212.

Recommendation # 10

The courts should consider the following factors relevant in assessing whether, and in what amount, aggravated damages should be awarded in sexual assault cases: victimization or oppression on the basis of gender, race, culture, ability, class, sexual identity, or other personal characteristics; the presence of a trust relationship between the plaintiff and defendant; and, if the defendant is a state actor, any breach of the *Charter*.

(iv) Punitive Damages

According to the Supreme Court of Canada,[190]

> Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. *Punitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant.* It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant. They are in the nature of a fine which is meant to act as a deterrent to the defendant and to others from acting in this manner. *It is important to emphasize that punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence*.

As to the distinction between aggravated and punitive damages,[191]

> Punitive damages, as the name would indicate, are designed to punish. In this, they constitute an exception to the general common law rule that damages are designed to compensate the injured, not to punish the wrongdoer. Aggravated damages will frequently cover conduct which could also be the subject of punitive damages, but the role of aggravated damages remains compensatory.

Several factors are relevant to the assessment of punitive damages. In some cases, the amount will be designed to prevent the defendant from profiting from his misdeed. In other cases, where the objective is to punish the defendant and to deter others, quantification may be more difficult. Other factors to be considered are the conduct of the parties, including the conduct of the defendant during litigation;[192] the size of the compensatory award; whether there have been prior criminal proceedings against the defendant; the means of the defendant; and, as we will argue below, whether there has been a breach of fiduciary duty or the *Charter* by the defendant. Like aggravated damages, punitive damages are not normally assessed jointly against tortfeasors.

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190. *Hill* v. *Church of Scientology* at 1208 (emphasis added).

191. *Vorvis* v. *Insurance Corp. of BC*, [1989] 1 S.C.R. 1085 at 1098-1099.

192. The conduct of the defendant may militate for or against punitive damages. For example, lack of remorse or outright harassment of the plaintiff during litigation may warrant punitive damages, while the admission of liability or decision not to assert a particular defence will militate against a punitive damage award. *See* Grace and Vella (2000) at 216-217.

In sexual assault cases, punitive damages are most frequently awarded to punish the defendant and to deter others from committing similar torts. The basis of liability is of critical importance here. For instance, while the intentional torts committed by perpetrators of sexual assault often attract punitive damage awards, mere negligence is not normally a sufficient basis for awarding such damages. Moreover, in a recent BC case, it was held that punitive damage awards should be made against defendants who are vicariously liable only where such defendants could be held criminally responsible for their actions.[193] In contrast, punitive damages may be available where the defendant's liability is for breach of fiduciary duty. As noted by the Supreme Court of Canada,[194]

> punitive damages may serve to reinforce the high standard of conduct which the fiduciary relationship ... demands be honoured. This is completely in keeping with the law's role in protecting beneficiaries and promoting fiduciary relationships through the strict regulation of the conduct of fiduciaries.

Another factor to be considered is whether any criminal sanctions have been levied against the defendant. In the sexual assault context, this factor is of most relevance in relation to the actual perpetrator of the abuse, as those liable for unintentional torts are not normally subject to criminal sanction. Punitive damages are generally not awarded where the defendant has been incarcerated as a result of a conviction for a criminal offence, as this would amount to "double punishment."

193. *K.(W.)* v. *Pornbacher* at 387-388. On this basis, punitive damages were not awarded against the defendant church. This case is currently under appeal.

194. *Norberg* at 300 *per* McLachlin, J.

This rule is subject to several exceptions. First, punitive damages may be awarded where the criminal conviction did not cover all of the incidents of abuse against the plaintiff.[195] Punitive damages may also be awarded where the criminal penalty is seen to be insufficient punishment for securing deterrence,[196] or where the defendant denies civil liability and puts the plaintiff to the strict proof of his or her claim.[197] In other cases, punitive damages have been awarded in addition to criminal sanctions without any analysis of the "double punishment" rule.[198]

The Ontario Law Reform Commission, in its 1991 *Report on Exemplary Damages*, recommended the "mitigation approach" to this issue, whereby criminal sanctions would not serve as a bar to an award of punitive damages, but would be considered as a factor in making this determination.[199]

The Committee believes that this approach is sound. Given the reluctance of courts to strictly adhere to the "double punishment" rule, it appears that there should be flexibility in assessing whether punitive damages are appropriate in a case where there have been some criminal sanctions. This is particularly so for cases of childhood sexual assault, where there may be a series of incidents, not all of which are dealt with in criminal proceedings.

195. *See M.(M.)* v. *F.(R.)* at 43 (B.C.S.C.). Punitive damages of $10,000 were awarded against the defendant foster brother. This was not challenged on appeal. Similarly, *see T.(K.A.)* v. *B.(J.H.)* at paras. 65-69, where $30,000 in punitive damages was awarded to each of the two plaintiffs despite the criminal conviction of their step-father. In other jurisdictions, *see B.(P.)* v. *B.(W.)* and *C.(S.L.)* v. *M.(M.J.)*.

196. *Glendale* v. *Drozdzik* at 115 (C.A.). Punitive damages were not awarded on the facts of the case, however. In *B.(A.)* v. *J.(I.)*, $50,000 in punitive damages was awarded to each of the three plaintiffs where the criminal sanction was found to "not fully sanction the defendant's criminal behaviour" (at 756).

197. *See K.(W.)* v. *Pornbacher* at 387. Punitive damages were awarded only against the defendant priest. This case is currently under appeal.

198. *See Queen (Litigation Guardian of)* v. *Hodgins,* (1991) 36 R.F.L. (3d) 159 (Ont. Gen. Div.), where punitive damages of $5,000 were awarded, as cited in C.P.M. Waters, "Multiple Punishment: The Effect of a Prior Criminal Conviction on an Award of Punitive Damages" (1996), 18 Advocates' Q. 34 at 41. According to Waters, "[t]he growing propensity to award punitive damages is particularly apparent in cases of sexual assault" (at 40).

199. Ontario Law Reform Commission, *Report on Exemplary Damages* (OLRC, 1991) at 46. The Supreme Court of Canada has turned down an opportunity to consider this issue anew, denying an application for leave to appeal in a case which squarely raised the issue. *See Buxbaum* v. *Buxbaum* (June 5, 1995), Ontario SCO/073/86 (Gen. Div.), *varied* [1997] O.J. No. 5166 (C.A.), application for leave to appeal to S.C.C. denied August 20, 1998.

Recommendation # 11

The courts should continue to adopt a flexible approach in assessing whether punitive damages are appropriate in cases where there have been criminal sanctions.

Quantum of punitive damages is another issue which arises in sexual assault cases. Again, this is an area where the awards in cases outside the realm of sexual assault are relatively higher. The upper range of punitive damages in sexual assault cases has not exceeded $50,000, and is often considerably lower than that.[200] In the defamation context, an award of $800,000 in punitive damages was upheld by the Supreme Court of Canada, as "[b]ut for [punitive damages], it would be all too easy for the large, wealthy and powerful to persist in libelling vulnerable victims. Awards of general and aggravated damages alone might simply be regarded as a licence fee for continuing a character assassination."[201] Large punitive damage awards have also been made for wrongful dismissal[202] and trespass to land.[203]

Some of these awards are based on the principle that a defendant should not profit financially from his wrongdoing, and are thus difficult to compare to sexual assault cases. However, deterrence is also a primary purpose of these awards, making it harder to distinguish them from sexual assault cases. Perhaps the more significant factor is the ability to pay of corporate or public

200. In the *Yeo* case, for example, the BC Court of Appeal reduced the jury's award of $250,000 in punitive damages to $50,000, as the former amount was seen to be "inordinately high and... not necessary to punish the defendant and to deter others" (at 174-175). In cases where there is more than one plaintiff, courts have imposed awards which provide each plaintiff with punitive damages, resulting in large awards in total against the defendant. There is no discussion of the impact of multiple awards in these cases, but the assumption seems to be that the violation of more than one victim justifies a larger punitive award. *See B.(A.)* v. *J.(I)*, where each of 3 plaintiffs was awarded $50,000 in punitive damages, and *C.(S.)* v. *M.(M.J.)*, where each of the 2 plaintiffs was awarded $50,000 in punitive damages.

201. *Hill* v. *Church of Scientology* at 1209.

202. In *Dixon* v. *BC Transit,* (1995) 9 B.C.L.R. (3d) 108 at 152 (S.C.), the court awarded punitive damages of $75,000 in circumstances where the plaintiff was fired without cause from a high profile public position after a short period of employment. Other wrongful dismissal cases where punitive damages have been awarded include *Ribeiro* v. *Canadian Imperial Bank of Commerce*, (1992) 44 C.C.E.L. 165 (Ont. C.A.) - $50,000 - and *Francis* v. *CIBC*, (1994) 7 C.C.E.L. (2d) 1 (Ont. C.A. - $40,000).

203. In *Epstein* v. *Cressey Development Corp*., (1992) 65 B.C.L.R. (2d) 52 at 59 (C.A.), *aff'd* (1990) 48 B.C.L.R. (2d) 311 (S.C.), $45,000 in punitive damages was awarded where the defendant developer deliberately constructed anchor rods encroaching on the plaintiff's land after she had refused permission. In *Horseshoe Bay Retirement Society* v. *S.I.F. Development Corp*., (1990) 66 D.L.R. (4th) 42 at 49-50 (B.C.S.C.), $100,000 in punitive damages was awarded against the corporate and individual defendants where the plaintiffs' trees were unlawfully cut to obtain an ocean view. *See also Prince Rupert* (*City*) v. *Pederson,* (1994) 98 B.C.L.R. (2d) 84 (C.A.), in which punitive damages of $25,000 were awarded against the defendant for deliberately destroying trees on the plaintiff's land to create an ocean view.

defendants, as compared with individuals in the sexual assault context.[204] While the issue has not arisen squarely in the sexual assault context, the defendant's ability to pay an award of punitive damages is arguably a proper consideration.[205] In those cases outside the sexual assault context where high awards for punitive damages have been made against individual defendants, ability to pay has been a consideration as well.[206]

Thus one might expect that institutional defendants would be subject to higher awards where they are liable for punitive damages in sexual assault cases, based on their ability to pay. On the other hand, the liability of such defendants normally sounds in negligence, breach of non-delegable duty, vicarious liability, or breach of fiduciary duty, which have not traditionally formed the basis for punitive damage awards. It can be argued, however, that while such conduct is not wilful as in the intentional torts of assault and battery, it is still culpable and deserving of deterrence. Should a child care institution, for instance, which has failed to screen its employees adequately, leading to an egregious case of child sexual abuse by an employee, be shielded from punitive damages because the action is framed in negligence? There is precedent to award punitive damages in cases of negligence where the defendant's conduct is such that it merits condemnation.[207]

In the view of the Committee, the defendant's basis of liability is an important factor to consider on the issue of whether to award punitive damages, but it should not operate as an absolute bar. Instead, the determination should depend on the facts of the particular case before the courts, and the level of culpability of the defendant's conduct. This approach is in keeping with our recommendation on the relevance of criminal sanctions. Where the defendant's conduct is culpable and deserving of an award of punitive damages, the amount of the award should be one which will serve as a real deterrent to future conduct of a similar nature by the defendant, and

204. According to Veit, J. in *Muir*, "the government has become so powerful that recognition that it is subject to large punitive awards remains one of the few judicial ways in which the actions of government can be made to take into account the rights of individuals" (at 354). She declined to make an award of punitive damages, however, as the government had admitted liability.

205. This was the conclusion of the Ontario Law Reform Commission in its report on punitive damages (at 50-52).

206. *See* for example *Mustaji* v. *Tjin*, (1995) 24 C.C.L.T. (2d) 191 (B.C.S.C.), *aff'd* (1996) 25 B.C.L.R. (3d) 220 (B.C.C.A.), where the BC Court of Appeal upheld a jury's award of $175,000 for punitive damages in a case where a domestic worker was essentially treated as a slave by her employer for a period of three years. The court found that there was evidence of ability to pay a large award of punitive damages. *See also Buxbaum* v. *Buxbaum*, where punitive damages of $65,000 were awarded to a plaintiff who experienced nervous shock after witnessing the murder of his aunt in a killing arranged by his uncle, the defendant. The trial court had awarded $130,000 in punitive damages, which was reduced by the Court of Appeal "having regard to the deterrent effect achieved by the extremely generous award for general damages and the sentence of life imprisonment, without parole for 25 years."

207. *See Robitaille* v. *Vancouver Hockey Club Ltd.,* (1981) 30 B.C.L.R. 286 at 310 (C.A.), where punitive damages were awarded against the defendant hockey club in circumstances where the plaintiff was ordered to play a game despite his injuries, resulting in further injuries to the plaintiff.

others in its position.

Recommendation # 12

A defendant's ability to pay, and basis of liability, are important factors in assessing whether and in what amount to award punitive damages. It should not operate as an absolute bar that the defendant's liability was based on an unintentional tort, or in equity. Where the defendant's conduct is found to be deserving of an award of punitive damages, the amount of the award should be one which will serve as an effective deterrent, and should be in line with awards made in other cases.

(v) Equitable Compensation

As noted earlier, breach of fiduciary duty is an equitable cause of action, giving rise to equitable as distinct from common law remedies. The goal of equitable remedies is "to restore the plaintiff as fully as possible to the position she would have been in had the equitable breach not occurred."[208] This is analogous to the operation of the restitutionary principle in common law damages for various breaches of duty.

Breach of fiduciary duty in sexual assault cases may be alleged against several actors: perpetrators, non-offending care-givers, and some institutions, including the Crown. The major compensation issue which arises where a breach of fiduciary duty is found to have occurred is the relationship between common law damages and equitable compensation.

In *M.(K.)* v. *M.(H.)*, where the defendant was found liable for assault and battery as well as breach of fiduciary duty for committing incest against his step-daughter, the Supreme Court considered whether equitable compensation was necessary in addition to common law damages in order to fully compensate the plaintiff. A majority of the Supreme Court held that the policy objectives animating the remedy for a breach of a parent's fiduciary duty were the same as those underlying the remedy for incestuous sexual assault: "to compensate the victim for her injuries and to punish the wrongdoer."[209] Thus the majority would not have awarded any compensation to the plaintiff

208. *See Norberg* at 295 (*per* McLachlin, J.)

209. *M.(K.)* v. *M.(H.)* at 80 *per* La Forest, J. The level of compensation was not a live issue in the case, as the plaintiff did not appeal the award made at trial.

in equity in addition to the jury's award of $10,000 for common law non-pecuniary damages. For the minority, Justice McLachlin argued that the wrong encompassed by a breach of fiduciary duty may be different from that encompassed by the tort of assault and battery, as the former includes an aspect of breach of trust. Given the strict duties imposed on trustees, it is particularly important to deter future breaches with an adequate measure of damages. While she suggested that this might lead to a different level of compensation in the case at bar, the damage award was not under appeal, so McLachlin, J. did not consider what level of equitable compensation would have been appropriate in the case.[210]

In most cases subsequent to *M.(K.)* v. *M.(H.),* the courts have declined to award compensation for breach of fiduciary duty where common law damages have already been awarded. The BC Court of Appeal held in *Yeo* v. *Carver* that there should be no additional compensation for breach of fiduciary duty, as the "factual matrix of the common law claim included breach of fiduciary duty, making damages at common law greater." Thus in the circumstances of the case, the equitable claim was seen to be "duplicitous."[211]

In contrast, an Alberta court awarded additional compensation for breach of fiduciary duty in *C.(S.L.)* v. *M.(M.J.)*. In this undefended case, two women sued their father for damages and compensation for 15 years of emotional, physical, and sexual abuse. The judge awarded non-pecuniary damages of $100,000 to each of the plaintiffs for assault and battery, being the highest award in any of the cases he had reviewed. For breach of fiduciary duty, the court relied on the judgement of McLachlin, J. in *M.(K.)* v. *M.(H.)*, and awarded an additional $75,000 to each plaintiff.[212] There was no more detailed elaboration of a rationale for adding these damages. It is not clear whether they were viewed as representing additional damages for non-pecuniary loss or, more specifically, as aggravated damages. All that we know is that they were reflective of the court's concern that the breach of trust in this case be reflected adequately in the award.

The Committee has considered the question of whether equitable compensation should be awarded in addition to common law damages in sexual assault cases where there is liability both in tort, and for breach of fiduciary duty. An alternative approach would be to consider the breach of fiduciary duty as an aspect of aggravated damages, or as warranting an award of punitive damages. As noted above, breach of trust is often considered to be an aggravating factor in the assessment of common law damages.

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210. *Ibid*. at 86. L'Heureux-Dubé, J. concurred with McLachlin, J. on this issue. *See also Norberg* at 293-301, where McLachlin and L'Heureux-Dubé, JJ. found the defendant liable for breach of fiduciary duty, and would have awarded $45,000 in equitable compensation.

211. At 177. *See also M.B.* v. *B.C.* (B.C.S.C.)*; K.L.B.* v. *B.C.* (B.C.S.C.)*; J.(L.A.)*.

212. According to the court, "it appears to me that the Supreme Court of Canada has considered that breach of fiduciary duty is significant. I therefore award, for breach of fiduciary duty, the sum of $75,000 for each plaintiff" (at 210-211). It appears that the cap on non-pecuniary damages was applied, although there is no discussion on this point. The court also awarded $50,000 in punitive damages for each of the plaintiffs.

While the approach suggested by McLachlin, J. in *M.(K.)* v. *M.(H.)* has some attraction at an abstract level, the rationale for it and how damages would be calculated and to what effect remains effectively uncharted. Moreover, it can be argued that there is inherent in common law damages the potential to reflect more clearly the serious exploitation of the power imbalance between the parties and the abuse of trust involved in breaches of fiduciary relations. The Committee has already argued that awards for the non-pecuniary effects of sexual assault should reflect more clearly the harm to the core of the survivor's being and the denial of that individual's worth as a person, inherent in the abuse. There is no reason why the harm cannot be considered more serious where the abuse takes place within a relationship of trust. Power imbalances do exist in contractual relations and others attracting tort liability. Where these are exploited or abused it is open to courts to award aggravated damages to take account of the enhanced emotional and psychological harm which that may cause the vulnerable party. If the exploitation or abuse takes place within a relationship of trust and dependency, allowance can be made for the more serious adverse effect on the abused party by a higher award of aggravated damages, subject, of course, to an overarching concern not to compensate twice for the same adverse effects. If the deterrent function of the law needs to be emphasized, punitive damages are available, which are flexible enough to reflect the enhanced concern caused by sexual assault within a relationship of trust.

On balance it seems to the Committee to be an additional complication to seek to calculate damages for breach of fiduciary obligation separately from common law damages, in particular when clear guidelines are lacking as to how this would be done in sexual assault cases. If courts accept the view that the objective in cases of sexual assault is to give restitutionary damages their most fulsome interpretation in the circumstances, there is no reason to treat damages for breach of fiduciary obligation outside the ambit of common law damages.

Recommendation # 13

In awarding damages for sexual assault for conduct which is characterized as both a tort and a breach of fiduciary relationship, courts should recognize the intensification of harm to survivors abused within a relationship of trust under the head of aggravated or punitive damages. Where a claim is brought for breach of fiduciary duty alone, courts should give equitable damages their most fulsome interpretation in the circumstances, guided by the conventional awards and factors applicable in the case of common law damages.

A related issue is the position and responsibilities of fiduciaries such as the Crown in the litigation context. How does a fiduciary relationship translate into concrete duties in this setting?[213] This is an area which, in the view of the Committee, merits further study and analysis.

Recommendation # 14

Further study and analysis should be undertaken of the responsibilities of fiduciaries such as the Crown in the context of sexual assault litigation.

(vi) Charter Damages

Section 24 of the *Charter* provides that where the defendant has breached the plaintiff's rights, the plaintiff may "obtain such remedy as the court considers appropriate and just in the circumstances." In some cases, an appropriate remedy may be damages. *Charter* damages may be awarded "to compensate the plaintiff, to deter future conduct or to punish the wrongdoer."[214]

As is the case with equitable compensation, the major compensation issue which arises in this context is the interplay between damages in tort and under the *Charter*. In some cases, courts have held that *Charter* damages should not be awarded, as the conduct in question is captured by principles of tort law.[215] In other cases, courts have awarded damages in tort and under the *Charter*.[216]

The issue of how to compensate survivors of sexual assault whose *Charter* rights have been violated has been considered in only one case. In *Jane Doe* v. *Metropolitan Toronto (Municipality) Commissioners of Police*, the court held that the plaintiff's damages were the same for both her claim in negligence, and for breach of the *Charter*. According to the court, "the same

213. In the case of Aboriginal persons, it has been found that a Crown's claim of solicitor-client privilege may be affected by the existence of a fiduciary duty. See *Samson Indian Nation* v. *Canada,* [1996] 2 F.C. 528 (F.C.T.D.). Moreover, a fiduciary duty may affect whether the Crown will be compelled to respond to interrogatories. See *Montana Band* v. *Canada*, [1999] 4 C.N.L.R. 65 (F.C.T.D.). The Committee wishes to acknowledge the assistance of Professor Nigel Bankes, Faculty of Law, University of Calgary, with this issue.

214. *See* Linden, *Canadian Tort Law* at 315.

215. *See* for example *Bauder* v. *Wilson*, (1988) 43 C.R.R. 149 (B.C.S.C.), where damages for an assault during an arrest were awarded in tort, but not under the *Charter*. According to the court, "to grant an additional financial award to the plaintiff runs contrary to the principle that double compensation should not be awarded" (at 154).

216. *See* for example *Rollinson* v. *Canada,* (1994) 20 C.C.L.T. (2d) 92 (Fed. Ct.), in which $8,000 in general *Charter* damages were awarded in addition to damages in tort for "cruel and unusual treatment" of the plaintiff by customs officials.

conduct by the police ... supports and establishes both causes of action. In such circumstances the plaintiff is entitled to one award of damages to compensate her for the damage she has suffered. She is not … entitled to any additional or "extra" damages because the police conduct breached her Charter rights." The court granted the plaintiff a declaration to the effect that her rights had been violated.[217]

In the opinion of the Committee, this issue should be treated in an analogous way to that of equitable compensation for breach of fiduciary duty. While the wrong encompassed by the breach of a *Charter* right is arguably of a qualitative difference from the wrong encompassed by common law torts, there has been little guidance from the courts in this area, and there would be difficulties in calculating the extent of extra compensation warranted for a breach of the *Charter*. Moreover, just as common law damages have the potential to account for the abuse of trust involved in breaches of fiduciary relations, so can common law damages account for the culpability of the state for interfering with constitutionally protected rights by considering the harm more serious in cases where there is a breach of the *Charter*. Again, this heightened level of seriousness can be dealt with under the heads of aggravated and punitive damages.

Recommendation # 15

In awarding damages for sexual assault for conduct which is characterized as both a tort and a breach of the *Charter*, courts should recognize the intensification of harm to survivors abused within this context under the head of aggravated or punitive damages. Where a claim is brought for breach of the *Charter* alone, courts should give *Charter* damages their most fulsome interpretation in the circumstances, guided by the conventional awards and factors applicable in the case of common law damages.

(b) Pecuniary Damages

(i) Introduction

Pecuniary damages are compensatory and restitutionary in nature – their purpose is to provide plaintiffs with a quantum of money which seeks, insofar as possible, to put them in the same position they would have been in if they had not been injured. In contrast to non-pecuniary loss, where the goal is to award "fair" compensation, "full" compensation is the goal in assessing pecuniary damages.[218] The basis of the defendant's liability is irrelevant with respect to pecuniary damages, as the focus is squarely on the plaintiff's losses rather than the defendant's conduct.

217. At 740.

218. *See Andrews* at 462, as cited in Cooper-Stephenson at 108.

In the mid 1990's, several Canadian commentators noted that there were relatively few sexual assault cases in which pecuniary damage awards were made. Difficulties cited included the failure on the part of courts to accept expert evidence,[219] and to properly translate the harm suffered by survivors of sexual assault into economic damages.[220] While progress has been made in this context, there are still several areas of concern that we will address in this section of the report.

Pecuniary damages are sub-divided into several categories: special damages, encompassing pre-trial costs of care and lost wages;[221] future loss of earning or working capacity; and future cost of care. We will examine the relevant heads of pecuniary damages in turn.

(ii) Loss of Earning Capacity

For plaintiffs injured as adults, loss of earning capacity is based upon their employment history. For plaintiffs injured as children, who have no employment history, or a history affected by their injuries, loss of earning capacity is normally calculated on the basis of statistical tables, which set out the average earnings for males or females with particular levels of education and training. The tables for females generally project much lower wage losses, based on the lower levels of income received by women in the marketplace. Once the average earnings are assessed for someone in the plaintiff's position, they are fine tuned to account for various contingencies which would be expected to increase or decrease the plaintiff's earnings over the course of his or her working life.

219. *See* for example *Gray* v. *Reeves,* (1992) 10 C.C.L.T. (2d) 32 (B.C.S.C.), where the court rejected expert evidence as to the plaintiff's economic losses in favour of its own assessment. For critiques of this decision *see* Des Rosiers and Tellier.

220. *See* Sutherland at 213; Feldthusen, "Discriminatory Damage Quantification," at 139.

221. As noted by Grace and Vella, while special damages must be particularized and proven, this can be done by way of reasonable estimates corroborated by some evidence. In addition to the usual realm of past medical expenses and lost wages, special damages may include compensation for expenses related to moving, security, and transportation (at 198-199).

Several authors have noted that the use of separate statistical tables for males and females serves to perpetuate the wage discrepancies faced by women in the labour market.[222] Moreover, "negative contingencies" are disproportionately used to reduce awards for female plaintiffs, including the assumption that females will marry, and that marriage and family responsibilities will result in a reduction of income.[223]

In a number of decisions, courts in BC have used various means to attempt to close this gender gap. In some decisions, courts have used male earnings tables for female plaintiffs, recognizing that the female tables are based on, and would perpetuate, inequalities. The resulting figures for projected loss of earnings were then discounted by various percentages to account for other contingencies.[224] This approach has been extended in Alberta, where a trial judge noted that the contingencies themselves must also be scrutinized for gender bias.[225]

222. *See* J. Cassels, "Damages for Lost Earning Capacity: Women and Children Last!" (1992), 71 Can. Bar Rev. 445; J. Cassels, "(In)Equality and the Law of Tort: Gender, Race and the Assessment of Damages" (1995), 17 Advocates' Quarterly 158; E. Gibson, "The Gendered Wage Dilemma" in K. Cooper-Stephenson and E. Gibson, eds., *Tort Theory* (North York: Captus University Press, 1993) at 185; Tellier at 39.

223. Cassels, "Damages for Lost Earning Capacity" at 454-457. Cassels notes that for male plaintiffs, marriage is often seen as a positive financial contingency, and that child care and similar costs are never deducted from damage awards of male plaintiffs.

224. *See Tucker* v. *Asleson* (April 25, 1991), Vancouver B871616 (B.C.S.C.), *aff'd* (1993) 102 D.L.R. (4th) 518 (B.C.C.A.). The court accepted "as a starting point, that the measure of the plaintiff's earning capacity should not be limited by statistics based upon her sex" (at 83). However, the court went on to discount the award by 63% to reflect the contingency that the plaintiff might not have graduated from university. A majority of the Court of Appeal found no reversible error by the trial judge. In a more recent case, the B.C.S.C. used male earning statistics for a female plaintiff, with a deduction of 6% to account for the plaintiff's individual circumstances. *See Terracciano* v. *Etheridge* (May 6, 1997), Vancouver B943125 (B.C.S.C.).

225. *See MacCabe* v. *Westlock R.C.S.S.D. #110 et al,* (1998) 226 A.R. 1 at 109-110 (Q.B.), a personal injury case. This case is under appeal.

The use of male statistics and contingencies for female plaintiffs has not yet been fully sanctioned at the appeal level.[226] In the sexual assault context, the courts continue to apply the controversial female earnings tables in calculating damage awards for future loss of earnings.[227] Another approach is for the court to use statistics for the Canadian public as a whole to calculate damages for loss of future earnings for both male and female plaintiffs. [228]

Race may also be a factor leading to inequalities in the assessment of lost earning capacity. While this area has not been researched to the same extent as gender bias, Cassels has noted some of the problems faced by Aboriginal plaintiffs:[229]

> First the argument is sometimes made that native plaintiffs suffer less injury because their health or material prospects were in any event diminished by reason of physical or socio-economic factors related to their race. Secondly, individual prospects and value are typically measured against the culturally dominant standard of the market from which First Nations individuals are largely excluded. Thirdly, as in the case of women, gendered and racialized statistical indicators are deployed to prove that plaintiffs' pre-accident life prospects were not favourable (when measured against the market yardstick) and therefore, their economic loss due to the accident was not great.

The perpetuation of gender, racial, and other forms of bias through the use of statistical earnings tables and negative contingencies is an issue that goes beyond the context of sexual assault cases. However, it is of particular concern to the Committee because of the reality that plaintiffs in sexual assault cases are largely women, and often members of groups which have been historically marginalized on the basis of race, culture, and other personal characteristics.

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226. *See Cherry (guardian ad litem)* v. *Borsman,* (1992) 94 D.L.R. (4th) 487 (B.C.C.A.); *Mulholland (guardian ad litem of)* v. *Riley,* (1995) 12 B.C.L.R. (3d) 248 at 262 (C.A.). While the Supreme Court of Canada has recognized that "the earning tables for women reflect past inequities which have historically resulted in women on average earning less than men," it has not yet been presented with a case in which to remedy this situation. *See Toneguzzo-Norvell* v. *Burnaby Hospital*, [1994] 1 S.C.R. 114 at 124 (*per* McLachlin, J.).

227. In *Beaudry* v. *Hackett*, the court rejected counsel's submissions that the male and female earnings tables should be averaged out. The court reduced the amount of loss projected from the female earnings tables, based on his view of the plaintiff's income potential, but then increased this figure based on "the progression in female incomes." The final figure arrived at for loss of future earnings was $40,000. In *P.* v. *F*, the court awarded the plaintiff $203,000 for loss of future earnings, based on the earnings tables for females with a post-secondary diploma, and assumed she would re-enter the workforce after some years of therapy. While this award is encouraging because of its size, it is important not to lose sight of the fact that it was based on the flawed female earnings tables.

228. The Law Commission of Canada recommended this approach in *Restoring Dignity* at 180.

229. *See* Cassels, "(In)Equality and the Law of Tort" at 190-191.

It may be argued that tort law is not an appropriate vehicle for solving inequalities in wage rates or other systemic inequalities, as it is concerned primarily with private relationships between the parties.[230] However, neither should the tort system unnecessarily aggravate or amplify these inequalities. Indeed, courts are obliged to apply equality principles in developing the common law.

Recognizing that this issue goes beyond the sexual assault context, the Committee supports the efforts of lawyers and judges to develop and apply approaches for assessing losses of future earnings which avoid perpetuating bias on the basis of gender, race, culture, class, ability, and other bases of disadvantage.

Recommendation # 16

Lawyers and courts should continue to develop and apply approaches to the use of statistical earnings tables, and contingencies for loss of future earnings, which avoid perpetuating bias on the basis of gender, race, culture, class, ability, and other bases of disadvantage.

In other ways, the difficulties of assessing lost earning capacity may be unique for survivors of sexual assault. Causation of the plaintiff's diminished earning capacity is one such issue. Defendants may argue that the plaintiff's life circumstances would have led to low and erratic earning potential, regardless of the sexual assault(s). The difficulties in sorting through these factors were noted at trial in *A.(C.)* v. *C.(J.W.)*:[231]

> Past and future losses are more easily determined where they are clearly attributable to a single cause, e.g. damages suffered in a motor vehicle accident. In this case, the effect of the plaintiffs' problems predating [the sexual abuse] – delinquency, truancy, poor performance at school, family difficulties, alcohol and drug consumption and, in LK's case, hyperactivity – overwhelms the task of attributing a monetary value to any economic loss arising from [the] abuse. However, I conclude that the sexual abuse impaired each of the plaintiff's past and future income earning capacity.

In some cases, the courts have found that the plaintiffs could not prove that the sexual abuse caused or materially contributed to their educational and occupational difficulties.[232] Part of the difficulty here may lie with the rules of causation themselves, as noted above, which are especially acute in the case of multiple, sequential tortfeasors. Expert evidence is often critical

230. Cassels notes this argument *ibid.* at 162. *See* also M. McInnes, "The Gendered Earnings Proposal in Tort Law" (1998), 77 Can. Bar Rev. 152, who argues that approaches to resolve gender bias in this area may not ultimately work to the benefit of women.

231. *A.(C.)* v. *C.(J.W.)* at 295-296 (B.C.S.C.).

232. *See* for example *McCulloch* v. *Green* at paras. 49-52; *E.D.G.* at 104, 106 (B.C.S.C.).

in assisting courts to deal with issues around proof of loss in this area.[233] On the other hand, this area has proved to be particularly vulnerable to judges substituting their own assessments of causation for those of experts.[234] However, and as noted in the introductory section of the report, it is well accepted that sexual assault causes consequential injuries which may interfere with a survivor's ability to earn an income, including depression, anxiety, sleep disorders, and substance abuse, and for children, disturbances of learning and child development.

Recommendation # 17

Judges should take full account of the economic aspects of harm in sexual assault cases, and the importance of accepting expert evidence in this area.

(c) Loss of Homemaking Capacity

Another area of pecuniary damages relates to the economic consequences of a loss of homemaking capacity. The BC Court of Appeal has affirmed that damages may be awarded for "the impairment of the ... ability to perform normal household tasks."[235] This loss was recognized as an economic one, properly assessed as an aspect of pecuniary damages.[236]

Loss of homemaking capacity is another issue which goes beyond the sexual assault context, but which is of particular significance here because of the preponderance of female survivors. While this head of damage may in some ways perpetuate the social expectations of women's work, it recognizes the reality that it is still women who perform the majority of household tasks in society. More consistent recognition of this head of damage, without reductions for gender-based contingencies, may diminish some of the traditional problems in calculating the pecuniary losses of female plaintiffs in sexual assault cases.

233. *A.(C.)* v. *C.(J.W.)* at 296 (B.C.S.C.).

234. For example, *see McCulloch* and *Gray* v. *Reeves.*

235. *Kroeker* v. *Jansen*, (1995) 4 B.C.L.R. (3d) 178 at 182 (C.A.), leave to appeal to S.C.C. dismissed (November 2, 1995) 11 B.C.L.R. (3d) xxviii.

236. However, damages under this head were reduced from $23,000 to $7000, as the court ruled that the assessment of $10/hour for 130 hours/year would decrease over time (*ibid.* at 189). *See also Fobel* v. *Dean,* (1991) 83 D.L.R. (4th) 385 (Sask. C.A.), leave to appeal to S.C.C. dismissed (March 5, 1992), 87 D.L.R. (4th) vii. Larger awards than that in *Kroeker* have been awarded in other jurisdictions following the lead in *Fobel*. *See* Cooper-Stephenson at 313-336.

(d) Loss of Family Income

A third area in which pecuniary damages may arise is in claims for loss of family income. While traditionally framed as a loss of opportunity to marry, the BC Court of Appeal has more recently conceptualized this as a loss of opportunity to form a dependency relationship, with resulting pecuniary and non-pecuniary consequences.[237] The pecuniary losses here may include loss of benefit of increased income, shared expenses, and shared housekeeping.[238]

This is a positive development, and one of particular note in sexual assault cases, given that survivors often experience problems forming or maintaining intimate relationships. While this head of damage met with some resistance in early sexual assault cases,[239] it has met with favour in more recent cases**,** a trend that we encourage.[240]

Recommendation # 18

In appropriate sexual assault cases, courts should award damages for loss of homemaking capacity and loss of family income, without reductions for gender-based contingencies. Wherever possible, each head of pecuniary damages should be particularized.

(e) Cost of Future Care

A final head of pecuniary damages meriting attention is the cost of future care, relating to the expenses the plaintiff expects to incur in treating the injuries caused by the defendant, including counselling and therapy, medication, and vocational and educational upgrading.[241] As is the case with other heads of pecuniary damages, the courts may not fully recognize the plaintiff's harm, or may require the plaintiff to present herself as harmed in every way in order to fully qualify for

237. *See Reekie* v. *Messervey*, (1989) 36 B.C.L.R. (2d) 316 (B.C.C.A.). This new head of pecuniary damage may answer concerns about the traditional "loss of opportunity to marry," which was criticized for "reinforcing heterosexuality as the norm." *See* Sheehy at 218. *See also* Des Rosiers at note 27.

238. Cooper-Stephenson at 337-338.

239. *See* for example *Gray* v. *Reeves*, where the court compensated the loss of family income as an aspect of non-pecuniary damages because "it is quite impossible for one to predict with any degree of accuracy whether the failure to marry or form ... a relationship of interdependency will generate negative or positive economic consequences" (at 85).

240. *See* for example *L.M.N.* v. *Munday* (4 November 1998), New Westminister SO 41750 (B.C.S.C.), where the court awarded damages for "loss of marriage benefits" together with damages for loss of earning capacity in the amount of $250,000, noting that the plaintiff's sexual functioning and ability to form a long term caring relationship was affected by the sexual abuse.

241. Grace and Vella (2000) at 203.

such damages. Here again, the courts may substitute their own opinions of plaintiffs' prospects for recovery for those of experts.[242] In other cases, however, more substantial awards for the cost of future care have been granted.[243] Implementation of Recommendation #6 with respect to judicial training programs will assist with difficulties in this area as well, and help to ensure that judges accept expert evidence in appropriate circumstances.

3. Other Damages Issues

(a) Secondary Victims

Secondary victims are those whose injuries are not directly caused by tortious conduct. As noted by the Law Reform Commission of British Columbia in its *Report on Pecuniary Loss and the Family Compensation Act*,[244]

> When one person is injured others may also suffer financially and emotionally. Members of the victim's family, for example, are often called upon to contribute time and money for the care of the victim and serious injuries often cause grief and place strain on family relationships. The injury of a loved one can have traumatic consequences, altering lives tragically and permanently.

Traditionally, damages have been quite restricted for secondary victims, who must fit themselves within the categories of "nervous shock" or "emotional harm." Generally, damages for the negligent infliction of emotional harm are available only where the injuries amount to a "recognizable psychiatric illness" rather than "mere emotional upset, no matter how distressing."[245] Moreover, the injuries must be a foreseeable consequence of the negligent conduct.[246]

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242. *See* for example, *Beaudry* v. *Hackett*, where the court stated that it "had a more optimistic outlook for [the plaintiff's] future" than the expert. This aspect of the decision is criticized by Feldthusen in "Discriminatory Damage Quantification," who notes that "[c]ourts tend to be optimistic about the prospects of quick and complete recovery," often dismissing expert evidence to the contrary and ignoring "the possibility that the plaintiff's condition may deteriorate and her awareness of her injuries increase over time" (at 137).

243. *See* for example *P.* v. *F.* ($25,287 for therapy and $8700 for associated travel costs claimed, and awarded); *T.(K.A.)* v. *B.(J.H.)* ($30,000 for future care). *See also Jane Doe*, where the court awarded future transportation costs of $2000/year (in present value) for 15 years.

244. Law Reform Commission of British Columbia, *Report on Pecuniary Loss and the Family Compensation Act* (LRC 139; 1994) at 1.

245. *See* Linden, *Canadian Tort Law* at 389-390. According to Cooper-Stephenson at 843, the lines being drawn are often arbitrary.

246. For example, damages for nervous shock are usually recoverable for witnessing or observing the aftermath of an accident, but not for learning of the accident some time later. *See* Linden, *ibid.* at 393-399. *See also Rhodes* v. *Canadian National Ry.,* (1990) 75 D.L.R. (4th) 248, where the BC Court of Appeal denied damages to a woman who suffered psychological illness after learning of her son's death in a railway accident.

The policy reasons for restricting compensation for secondary victims are to limit civil suits and consequent over-burdening of human activities. In response, however, it can be argued that the purpose of tort law is to provide redress where a wrong has been committed, provided that the requirements for liability and causation are met.[247]

Sexual assault may cause injuries not only to the direct victim, but to secondary victims as well. Aboriginal peoples have noted the multi-generational losses of culture, spirituality, language, and home caused in part by their treatment at residential schools.[248] The families of some survivors of sexual assault at the Jericho Hill School for the Deaf, who were not entitled to government compensation, applied for a class action to have their damages reckoned.[249] Unfortunately, there are few cases dealing with damages to secondary victims of sexual assault to provide guidance in this area.[250]

The Committee acknowledges that this issue goes beyond the context of sexual assault cases. Nevertheless, we support the view that the law in this area should be developed in favour of granting damages to secondary victims. In Ontario, families of survivors are empowered by legislation to seek compensation for personal injury to themselves resulting from a family member having been sexually assaulted.[251] In BC, the *Family Compensation Act* restricts actions

247. Linden, *ibid.* at 386-387.

248. *See* Assembly of First Nations, *Breaking the Silence: An Interpretative Study of Residential School Impact and Healing as Illustrated by Stories of First Nations Individuals* (Ottawa: Assembly of First Nations, 1994) at 175.

249. The application for a class action to redress the injuries sustained by the families of sexual assault victims was denied by the BC Court of Appeal on the basis that the claims "lack sufficient commonality to be amenable to class proceedings." *See R.(L.)* at para. 45.

250. In *D.(B.)* v. BC, (1995) 12 B.C.L.R. (3d) 306 (S.C.), a woman and her daughter were awarded approximately $60,000 damages each for injuries and losses sustained when the daughter was emotionally, physically, and sexually abused by two foster children placed in care of the mother by the defendant social workers. The mother's award consisted of $25,000 in non-pecuniary damages for injuries including acute anxiety, stress, sleeping problems, emotional difficulties, and loss of confidence and self-esteem; $30,000 for loss of earning capacity; and $5,720 for future care. On appeal, the BC Court of Appeal overturned the decision, finding that the social workers' conduct was not culpable. The Court of Appeal did not comment on the award of damages to the mother in this case. *See D.(B.)* v. *BC,* (1997) 30 B.C.L.R. (3d) 201 (B.C.C.A), leave to appeal to S.C.C. dismissed, (October 9, 1997) 97 B.C.A.C. 80 (note).

251. *See Family Law Act*, R.S.O. 1990, c. F-3, s. 61, as amended by S.O. 1992, c. 32; S.O. 1997, c. 20; S.O. 1998, c. 26, which provides that if a person is injured or killed by the fault or neglect of another under circumstances where the person is entitled to recover damages, that person's spouse, children, grandchildren, parents, grandparents, brothers, and sisters are entitled to recover their pecuniary and non-pecuniary losses resulting from the injury or death. Sexual assault cases in which successful claims under this legislation were made by family members of the survivor are noted in Grace and Vella (2000) at 224, and include claims by intimate partners, children, and parents.

by secondary victims to circumstances where the primary victim has died.[252] In 1994, the Law Reform Commission of British Columbia recommended that the *Family Compensation Act* be replaced by new legislation which would extend the right to claim compensation to secondary victims of non-fatal accidents.[253] More recently, the BC Trial Lawyers Association has identified the reform of this Act as an issue.

In our view, the Ontario legislation is an improvement upon the *Family Compensation Act*, but it is still somewhat restrictive in that recovery is limited to the survivor's family at the time of the tortious act. There needs to be a wider understanding of the long term effects of sexual assault on families and communities, as well as remedial options for those suffering losses as a result of the sexual assault of their family or community member.[254]

In the event that there is an amendment to, or replacement of, the *Family Compensation Act* to allow broader recovery for secondary victims, it will still be incumbent upon the courts to interpret and apply the legislation. This is another area where a benchmark case or guidelines from the BC Court of Appeal would be helpful, as would training programs for judges on the secondary injuries flowing from sexual assault in a broad range of contexts.

Recommendation # 19

In the context of a broad review of the *Family Compensation Act*, the Government of BC should amend the *Act* to permit secondary victims of sexual assault, broadly defined, to seek compensation. Courts should interpret the principles at play in these cases in favour of awarding damages to secondary victims in appropriate cases.

252. *See Family Compensation Act,* R.S.B.C. 1996, c. 126, s. 2.

253. Law Reform Commission of British Columbia, *Report on Pecuniary Loss and the Family Compensation Act* at 33-35. The Commission recommended that the claims of secondary victims be allowed in non-fatal accident cases for grief counselling, guidance, care, and companionship (for children only), and for pecuniary losses for persons suffering financial losses as a result of caring for non-fatal accident victims. Claims for lost support and lost services should continue to be restricted to fatal accident cases in the view of the Commission.

254. It may well be that the losses of communities in particular are better addressed through means other than civil actions, such as reconciliation and redress programs.

E. Representation, Procedure, and Recovery Issues

1. Access to Justice Issues

(a) Introduction

As noted in the introductory section, several access to justice issues arise in the context of civil claims for sexual assault. In this section, we will review and make recommendations relating to the availability of information and support for civil actions, the availability and costs of legal representation and disbursements, and court ordered costs.

(b) Information and Support

One of the issues which came to light in our consultations with front line workers was the need for better access to information and support for sexual assault survivors contemplating civil actions for damages. For example, it was noted that other than seeking an opinion from another lawyer, there is no place for survivors to go for help in discussing their cases, their lawyers' fees, and so on. The information and support needs of disadvantaged and isolated communities are even more acute.

These concerns have been raised in other studies as well. The Law Commission of Canada recommended that "prospective plaintiffs should have access to basic information about civil actions at no cost [and] to support services to assist them in coping with the stress of civil litigation."[255] The Commission's report in itself is an important step in the provision of information to survivors, as we hope our own will be, but further work needs to be undertaken, and resources dedicated by local organizations and governments. We agree with and adopt all of the recommendations made by the Commission in this area, and would only extend them to apply to sexual assault survivors more broadly.

255. Law Commission of Canada, *Restoring Dignity* at 176. *See also* Feldthusen et al at 105 to 111, who recommended the following:
"Provide information about each procedure. ...
Have a volunteer roster of women who have gone through the same process. ...
When possible, provide a "support person" to help claimants through the process. ...
Ensure that claimants have adequate counselling before entering into any process. ...
Ensure comfortable hearing and adjudication settings. In the case of civil litigation, familiarize the client with the surroundings before the trial. ..."

Recommendation # 20

Survivors of sexual assault should have access to information about civil actions, including how to contact and choose a lawyer, the civil procedure, costs (financial and emotional), possible outcomes and length of the process, and alternatives. This information should be developed and provided free of cost by the BC government, Law Society of BC, Legal Services Society of BC, public legal education societies, and law schools' legal clinics.

The government of BC should provide financial resources to community organizations and survivors' groups to develop their own educational initiatives in this area.

Recommendation # 21

Support networks comprised of survivors of sexual assault who have experience with the civil justice system should be established and promoted by local social service agencies. Survivors should also have access to the names of community organizations and therapists with expertise in providing support and counselling for survivors.

(c) Legal Representation, Disbursements, and Costs

Civil actions for sexual assault will invariably cost plaintiffs a few thousand dollars in legal fees and disbursements, and those which proceed to trial will normally cost tens of thousands of dollars. Anecdotal evidence suggests that $50,000 may be an accurate average figure for civil sexual assault trials, with cases involving institutions resulting in even higher expenses.[256] Legal fees may be paid on a contingency basis in BC,[257] and would thus be taken out of any award of damages. A plaintiff will normally be responsible for paying the disbursements for a civil action up front, including the cost of expert reports, the filing of court documents, and so on. If a survivor qualifies, legal aid may be available to pay for disbursements, although not lawyers' fees.[258] Some of these expenses may also be recovered through an award of costs made at trial, an issue which will be discussed below.

256. Feldthusen et al found the average cost of a civil sexual assault trial to be $20,000, but this was based on a small sample, and included one case where counsel provided free legal services. *See ibid.* at 96-97.

257. *Legal Profession Act*, S.B.C. 1998, c. 9, s. 66.

258. Legal Services Society of British Columbia, *Guide to Legal Aid Tariffs: Non-Tariff Retainers* (L.S.S.B.C., 1999) at 1-3. Not all disbursements will be covered, however. Many require prior authorization of the Legal Services Society, and will only be covered where they are "reasonable and necessary." Even where this standard is met, the Legal Services Society may decline to pay for disbursements, given its limited resources. The Legal Services Society must be reimbursed for the cost of disbursements out of the damages award.

One of the theoretical advantages of the civil justice system is that the plaintiff "runs the show," and may, amongst other things, choose her own lawyer and have some say in how her case is presented. However, our consultations revealed that survivors may have difficulties finding lawyers willing to take on their cases, regardless of the fact that contingency fees are available and disbursements may be covered. This relates to the central theme of this report: if the quantum of damages a potential plaintiff can expect to receive is low, many lawyers may be dissuaded from taking on the case, as the damages will not be sufficient to offset their fees.

Conversely, concerns were also expressed that lawyers may take on sexual assault cases without sufficient expertise, and without understanding that survivors need greater contact with their lawyer and support than a personal injury litigant normally does. This speaks to the need to ensure that lawyers and future lawyers conducting civil sexual assault cases have access to training. The potential legal complexity of these cases, as well as the needs of survivors as clients, should be included in such training sessions. The provision of training may also, in part, offset the concerns about the lack of lawyers willing to take on sexual assault claims.

Recommendation # 22

We endorse the efforts of, and encourage further initiatives on the part of, continuing legal education organizations, the Law Society of BC, and law schools to provide professional development and education programs dealing with the conduct of civil sexual assault cases.[259]

A related issue of legal representation concerns the over-marketing undertaken by some lawyers to survivors of sexual assault. This practice may include recruitment of clients, often for group actions. The potentially exploitative nature of this practice was raised in our consultations, particularly on behalf of Aboriginal survivors of residential school abuse.

While the current BC *Professional Conduct Handbook* prohibits inappropriate marketing activities, including those which are "calculated or likely to take advantage of the weakened state, either physical or emotional, of the recipient,"[260] we believe that this rule of conduct could be made more explicit to the exploitation that may occur in the sexual assault context. For example, Saskatchewan recently amended its code of professional conduct to define "weakened state" to include "the state of any prospective client who is an alleged victim of physical and / or sexual abuse."[261] We believe this is a sound approach, although we would prefer the use of the term "vulnerable" to "weakened state."

259. A similar recommendation was made by the Law Commission of Canada. *See Restoring Dignity* at 177.

260. Law Society of British Columbia and Ziskrout, R., ch.14, rule 5(a), as amended effective 01/00.

261. Law Society of Saskatchewan, *Code of Professional Conduct*, rule 1602.1, as cited in Law Commission of Canada, *Restoring Dignity* at 188, n. 77.

Recommendation # 23

The Law Society of BC should amend Chapter 14, rule 5(a), of the *Professional Conduct Handbook* to replace the term "weakened state" with the term "vulnerable," and should define this term to explicitly include survivors of sexual assault, such that the recruitment of and directed advertising to survivors is restricted.

A final issue which arises in relation to the financial cost of civil actions for sexual assault is the extent to which expenses may be recovered through an order for costs. Three levels of costs may be awarded to a successful plaintiff. At the lowest level, ordinary or party and party costs are those fees the Registrar considers "proper or reasonably necessary for the conduct of the proceedings" according to a certain scale.[262] These costs do not cover all of the plaintiff's actual costs in relation to the litigation. Special costs are the most generous costs which may be awarded to a successful plaintiff, and amount to the total costs which a reasonable client would pay a reasonable lawyer. Such costs are discretionary, and are rarely awarded; a defendant must have acted reprehensibly in the course of the proceedings, including pre-trial.[263] Where a court does not believe that special costs are warranted, but where an award of ordinary costs would produce an unjust result, the court may award increased costs as a percentage of special costs. Increased costs may be awarded where there is a considerable disparity between ordinary and special costs, and where some other factor such as special importance, difficulty, or complexity is present.[264]

In considering an award of special costs, a court must review the effect of the defendant's misconduct on the plaintiff in addition to the misconduct itself.[265] Moreover, the court may consider the fact that one party has "impose[d] the burden of the proceedings ... on the opposing party in circumstances where one party is financially much stronger than the other ..."[266]

262. *Supreme Court Rules*, Rule 57(1), Appendix B.

263. *See* Rule 57(3). Special costs were formerly known as "solicitor-client costs." For a case reviewing the factors which are taken into account when assessing special costs, *see Garcia* v. *Crestbrook Forest Industries,* (1993) 86 B.C.L.R. (2d) 394, additional reasons at (1994) 9 B.C.L.R. (3d) 242 (C.A.).

264. *Rieta* v. *North American Air Travel Insurance Agents Ltd*., (1998) 105 B.C.A.C. 239 (B.C.S.C.), commenting at para. 24 on *National Hockey League* v. *Pepsi Cola Ltd.,* (1992) 92 D.L.R. (4th) 349 (B.C.C.A.).

265. *Swinburn* v. *Dike*, [1995] B.C.W.L.D. 2309 (Master), as cited in Continuing Legal Education Society of BC, *Family Law Sourcebook for British Columbia* (November 2000 edition) at 12-16.

266. *Garcia* v. *Crestbrook Forest Industries* at 251.

As noted in this report, sexual assault proceedings may be particularly trying for plaintiffs, especially when the defendant disputes liability and the plaintiff is required to testify and submit to cross-examination by the person who abused her. Indeed, some defendants may dispute liability as a means of maintaining power and control over sexual assault survivors. However, there are relatively few sexual assault cases in which special costs have been granted. For example, in *Glendale* v. *Drozdzik*, the plaintiff was not awarded special costs despite the fact that the defendant had been criminally convicted, yet disputed civil liability.[267] In *A.(C.)* v. *C.(J.W.)*, the trial court found that the defendant Crown's conduct during the trial was objectionable, but not sufficiently so to order special costs.[268]

The cause of action may be significant here. In *Norberg* v. *Wynrib*, McLachlin, J., for the minority, would have awarded the plaintiff solicitor-client costs, noting that the discretion to do so is "often exercised" in cases of breach of fiduciary duty.[269]

In the view of the Committee, civil actions for sexual assault are unique in the area of costs. The rationale for the party and party costs regime is to spread the cost of litigation and encourage parties to settle their differences. Sexual assault cases involve some unusual dynamics which militate against settlement. The defendants are normally aware of the enormous stresses and vulnerabilities of the plaintiffs, often economic, and almost always on an emotional level. Moreover, defendants' interests in maintaining denial of liability are considerable. Absent special costs, a plaintiff is not fully compensated for her intentional injury, nor has her abuser fully paid the costs. Where liability is disputed in such cases, particularly where there is no sound basis for doing so apart from imposing a burden on the plaintiff, this should be seen as an appropriate basis for awarding special costs. The same is true of cases based on a breach of fiduciary duty, given the breach of trust inherent in such cases. Even where the defendant's liability is based in negligence, breach of non-delegable duty, or is vicarious, there may be justification for awarding special costs in sexual assault cases. These cases may be unique in that the ratio of litigation costs to compensation can be particularly problematic compared with other tort cases. Litigation costs are particularly high because of the need for expert evidence, the multiple bases of liability, the time frame of the claim, and so on. As noted, compensation is often low in sexual assault cases, to the point where lawyers may be unwilling to take such cases on. As a result, and despite the

267. At 116.

268. Increased costs were awarded at 80% of the amount of special costs. *See A.(C.)* v. *C.(J.W.)* (September 4, 1997), Vancouver C946690 (B.C.S.C.). In making this award, the court noted that the legal issues in the case were unique and complex, and that the plaintiffs had been efficient in litigating as a group. Moreover, the court rejected the defendant's submission that its conduct had already been penalized through the award for aggravated damages (which was overturned on appeal in any case).

269. At 301, citing *W.(B.)* v. *Mellor*, [1989] B.C.J. No. 1393 (B.C.S.C.) as an example of a case where a patient sexually exploited by her doctor was awarded solicitor client costs. The majority of the Court in *Norberg* awarded party and party or ordinary costs.

existence of provisions governing offers to settle,[270] there is also little incentive for defendants other than the perpetrator to settle civil actions for sexual assault, and survivors may be required to undergo a painful trial in which they are unlikely to succeed in any event. While the defendant's basis of liability may be one factor for the courts to consider in determining whether special costs should be awarded, it should not operate as a bar in this respect.

Recommendation # 24

In addition to the usual factors, courts should take into account the unique factors which may come into play in sexual assault cases, and award special costs in appropriate cases. These unique factors include the intentional nature of the conduct, the trauma to survivors of testifying, the power imbalance between the plaintiff and defendant, the high costs of sexual assault trials, and the lack of real incentives for defendants to settle.

2. The Civil Trial Process

(a) Jury Trials

In our Working Paper, we identified several issues relating to the use of jury trials for civil sexual assault actions in BC. These issues include the extent to which courts and legislatures should provide guidelines for juries for damage awards, the scope of appellate review, the availability of jury trials where the Crown is a defendant, and whether reforms are available which would make jury trials a more significant option for survivors of sexual assault. Unfortunately, we received little feedback on these important issues, nor are they addressed in other recent studies. We recommend that further study be undertaken in this area, with a view to addressing the questions raised above.

Recommendation # 25

Further study should be undertaken on the issues relating to the use of jury trials for civil sexual assault actions in BC, including the extent to which courts and legislatures should provide guidelines to juries for damage awards, the scope of appellate review, the availability of jury trials where the Crown is a defendant, and whether reforms are available which would make jury trials a more significant option for survivors of sexual assault.

270. Supreme Court Rules, Rule 37.

(b) Privacy Interests

The Committee's Working Paper did not address issues relating to the privacy interests of survivors, although we did receive a few comments on these issues in our consultations. One of our consultants noted the difficulties inherent in the Supreme Court of Canada's approach to privilege over personal records, which must be determined on a case by case basis.[271] On the other hand, survivors may also have difficulties in accessing records made by institutions about the circumstances surrounding sexual assault.

The Law Commission of Canada addressed some procedural privacy issues in its report on institutional abuse, and recommended that "Courts should generally respect the requests of plaintiffs to preserve their privacy over the course of a trial," by using initials to report the case, sealing files, obtaining non-publication orders, and holding proceedings *in camera*.[272]

Again, this is an area we believe merits further study and consultations in the province of BC.

Recommendation # 26

Further study should be undertaken on issues relating to the privacy and access to information interests of plaintiffs in civil sexual assault actions in BC.

3. Interest Issues

Pre-judgment interest is awarded in relation to damages "from the date on which the cause of action arose to the date of the order." In BC, pre-judgment interest is generally awarded for causes of action arising after 1974 on non-pecuniary damages, aggravated damages, and punitive damages. Pre-judgment interest is awarded on pecuniary damages relating to past losses, but not to future losses.[273] The rate of interest payable is up to the discretion of the trial judge.

271. *See A.M.* v. *Ryan*, [1997] 1 S.C.R. 157.

272. Law Commission of Canada, *Restoring Dignity* at 179.

273. *See Court Order Interest Act*, R.S.B.C. 1996, c.79, ss.1, 2, 5.

The rationale for pre-judgment interest is to "place the plaintiff in the position he would have been in had the award been paid on the day his cause of action arose."[274] In concrete terms, pre-judgment interest compensates the plaintiff for inflation, and for the lost opportunity of having invested the money.[275]

In 1993, the government of BC abolished pre-judgment interest on non-pecuniary damage awards in all personal injury cases.[276] The conventional wisdom at the time was that this amendment was motivated by the government's desire to limit the size of awards payable by the Insurance Corporation of BC in relation to motor vehicle accidents. BC's exclusion of pre-judgment interest is without precedent in other Canadian jurisdictions, and has been found by the courts to be "difficult to justify ... on a principled basis."[277]

While the issue of whether pre-judgment interest should apply to non-pecuniary damages goes beyond the sexual assault context, there are several arguments in favour of treating sexual assault cases as exceptional. First, the 1993 amendment to the *Court Order Interest Act* was arguably not intended to apply to survivors of sexual assault. Second, although the result may be unintentional, the amendment adversely affects survivors by depriving them of the benefit of interest on an award which accounts for the number of years they lived with the effects of being sexually assaulted. This is of particular importance for survivors of childhood sexual abuse, where pre-judgment interest, properly calculated, can significantly increase the size of the damage award.[278] Third, where pre-judgment interest is not available, the defendant will improperly benefit by having the use of the money between the time of the tort and the time of judgment.[279] This result is particularly problematic in the case of perpetrators of sexual assault, whose conduct was intentional.

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274. *Leischner* v. *West Kootenay Power and Light Co.,* (1986) 70 B.C.L.R. 145 at 181 (B.C.C.A.).

275. *See* Cooper-Stephenson at 83. As non-pecuniary damages are already adjusted for inflation, pre-judgment interest on this amount relates solely to the lost opportunity to earn interest on the monies beyond the rate of inflation.

276. *Miscellaneous Statutes Amendment Act,* S.B.C. 1993, c.28, ss. 2, 3, enacting s. 2(e) of the *Court Order Interest Act*.

277. *See K.L.B.* v. *B.C. (B.C.S.C.)* at 7-8, 11. In Manitoba, there are no awards of pre-judgment interest on non-pecuniary damages, but courts must make an allowance for the plaintiff's loss of opportunity to invest the money in setting the quantum for non-pecuniary damages. *See Court of Queen's Bench Act*, S.M. 1988-89, c. 4, s. 80(3).

278. For example, in *Beaudry* v. *Hackett*, pre-judgment interest increased the plaintiff's award for non-pecuniary damages from $85,000 to approximately $135,000.

279. *See* Law Reform Commission of British Columbia, *Report on the Court Order Interest Act*, (LRC 90, 1987) at 64.

In *K.L.B.* v. *B.C.*, the BC Supreme Court considered for the first time the issue of whether section 2(e) of the *Court Order Interest Act* applies to equitable compensation for personal injury. While Dillon, J. held that the lack of differentiation between common law damages and equitable compensation did not take compensation for breach of fiduciary duty outside of the *Act,* she went on to find that the court has equitable jurisdiction to award pre-judgment interest independently of statute. Because the compensatory policy objective of pre-judgment interest was negated by section 2(e) of the *Court Order Interest Act*, the court found it was "just and proper" to award pre-judgment equitable interest for non-pecuniary loss due to personal injury.[280] Simple pre-judgment interest was awarded at the real rate of interest, 3.5%, on the entirety of the non-pecuniary damage award.[281]

This decision was overturned on appeal. While it was not necessary to do so, given that the finding of a breach of fiduciary duty itself was set aside, the BC Court of Appeal offered its remarks on the existence of an equitable jurisdiction to award pre-judgment interest. In the view of the Court, "equitable interest is not recoverable on an award of equitable compensation for personal injury," and should be restricted to "the limited category of property claims," for which there is precedent.[282]

Dillon, J.'s decision, while perhaps not based in precedent, was a clear attempt to avoid the injustice created by the statutory unavailability of pre-judgment interest. Even if her decision had been upheld in relation to equitable pre-judgment interest, section 2(e) of the *Court Order Interest Act* would continue to prevent many sexual assault survivors from claiming pre-judgment interest where a claim of breach of fiduciary duty was not available. In the Committee's view, section 2(e) of the *Court Order Interest Act* should be repealed. If it is not repealed, we support the extension of equitable pre-judgment interest to sexual assault cases.

280. *K.L.B.* v. *B.C.* at 19 (B.C.S.C.). This case was recently followed in *M.B. v. BC* (B.C.S.C.). In the latter case, Levine, J. awarded equitable pre-judgment interest against the Crown, notwithstanding that the Crown was not itself found to be liable in equity. The court held that the Crown's vicarious liability for the sexual assault of the plaintiff by a deceased third party, who had committed a breach of fiduciary duty, was sufficient to order equitable pre-judgment interest (at paras. 329 to 335). This issue was not addressed on appeal, although the Crown's liability was upheld.

281. The alternative to simple interest, compound interest, is only available in equity where the case involves fraud or accountability for profits. *See ibid.* at 20. Compound interest is also disallowed under the *Court Order Interest Act*, s. 2(c). The real rate of interest is set by the Chief Justice of the Supreme Court under the *Law and Equity Act,* R.S.B.C. 1996, c. 253, s. 56(2)(b), and amounts to the long term historical difference between the investment rate of interest and the rate of inflation.

282. *K.L.B.* v. *B.C.* at paras. 55-56 (B.C.C.A.). The Court was unanimous on this point.

Recommendation # 27

The government of BC should repeal section 2(e) of the *Court Order Interest Act.* If this section is not repealed, equitable pre-judgment interest should be available in sexual assault cases where a breach of fiduciary duty exists.

A second issue which arises in relation to pre-judgment interest is the appropriate time period for calculating interest. In BC, while pre-judgment interest was still available on non-pecuniary damages, the courts took several approaches in determining the time period for which such interest would be calculated in cases where sexual abuse lasted for a number of years. Similarly, in jurisdictions where pre-judgment interest is available, courts have taken a range of approaches.

Interest may be awarded from the mid-point of the period of sexual abuse,[283] from the beginning of the period of abuse,[284] or from the date of the last episode of abuse.[285] Another approach calculates interest from the date the plaintiff reasonably discovers the injuries, and the cause of action crystallizes.[286] In the *K.L.B.* v. *B.C.* case, yet another approach was taken, and interest was awarded from the date the plaintiffs filed their writ.[287]

An approach which calculates pre-judgment interest from the date of filing the writ is problematic, as this financially penalizes those survivors who decide to wait until criminal proceedings have concluded before commencing their civil claim.[288] Alternatively, if claimants suffer financial loss as a result of waiting to commence a civil action, some may choose not to participate in criminal proceedings at all. We believe that fixing the commencement of the accrual of pre-judgment interest from the time of filing the writ is against the public interest.

Another timing issue relates to whether pre-judgment interest is available at all. In some sexual

283. *See Beaudry* at 6, following *Harder* v. *Brown,* (1989) 50 C.C.L.T. 85 (B.C.S.C.). *See also B.(P.)* v. *B.(W.),* (1992) 11 O.R. (3d) 161 (Gen. Div.).

284. *See G.* v. *R.,* [1991] B.C.J. 66 (S.C.) at 9.

285. *See* for example *B.(A.)* v. *J.(I.).*

286. According to this approach, the plaintiff "cannot contend that she has lost the use of the money, or has been deprived of the use of the money, ... when she was not even aware ... that she had a claim to advance." To do otherwise is said to result in over-compensation of the plaintiff. *See R.(B.)* v. *Hollett* at 310, as cited in *K.L.B.* v. *B.C.* (B.C.S.C.) at 22.

287. *K.L.B.* v. *B.C. (B.C.S.C.)* at 23.

288. There are several reasons for doing so. Criminal proceedings might stop the perpetrator from committing further assaults. Moreover, a finding of criminal liability is advantageous for proving liability, or achieving a settlement, in the civil sphere. On the other hand, if the civil matter proceeds first, it may provide the perpetrator with additional avenues of discovery to assist him in his criminal case.

assault cases prior to the 1993 amendment, the courts interpreted section 5 of the *Court Order Interest Act* to mean that no pre-judgment interest was available where the abuse occurred prior to the enactment of the *Prejudgment Interest Act* in 1974.[289] In our view, this is inconsistent with the discoverability principle which developed in relation to limitation periods. It is now well established that a cause of action does not accrue until a plaintiff is reasonably capable of discovering the wrongful nature of the defendant's acts, as well as the connection between the abuse and her injuries.[290] In other words, there may be situations where sexual abuse occurred prior to 1974, but the cause of action does not arise until much later. While this may appear to create an inconsistency,[291] it is entirely conceivable that a survivor may not be aware of the harm done, or of its source, but her damages have already begun to accumulate. For these reasons, we believe it is appropriate that pre-judgment interest be awarded from the time of the sexual assault itself, even if this is prior to 1974. Where there was more than one instance of abuse, we believe it would be appropriate to calculate pre-judgment interest from the middle of the period of abuse. This approach recognizes that while inherent harm occurs from the onset of abuse, the action would not be commenced until the last episode of abuse, such that a point in between is appropriate.

Recommendation # 28

Courts should award pre-judgment interest in sexual assault cases even where the events occurred prior to the enactment of the *Prejudgment Interest Act* in 1974. Where there was more than one instance of abuse, pre-judgment interest should be calculated from the middle of the period of abuse.

4. Execution of Judgments

Even after all of the difficulties of a civil action for sexual assault have been surmounted, plaintiffs may not be able to realize on their judgments. Many defendants are impecunious, a phenomenon which used to be restricted to perpetrators, but has been said to be increasingly applicable to institutional defendants, based on the mounting number of law suits they are facing.

The financial impact of sexual assault judgments on institutional defendants, particularly charitable organizations, is an area in which some have expressed concern. For example, the Christian Brothers of Ireland ("CBIC") were facing numerous claims for sexual, physical, and

289. *S.B.C. 1974, c. 65. See Gray* v. *Reeves* at 85, for example. This case was recently cited with approval in *K.L.B.* v. *B.C.* (B.C.S.C.), although in *obiter* (at 7).

290. *See M.(K.)* v. *M.(H.)* at 24.

291. Feldthusen notes that "arguments about when the interest period ought to begin may prove inconsistent with arguments about when the limitation period ought to begin in child sexual abuse cases." See "Discriminatory Damage Quantification" at note 59 and accompanying text.

emotional abuse against boys at the Mount Cashel orphanage in St. John's, Newfoundland from the 1960s to 1980s. The CBIC made an application for winding up when it became clear that the value of the claims against it far outweighed its assets. A liquidator was appointed, and sought to liquidate the CBIC's assets, including properties in Vancouver on which 2 private schools are operated – Vancouver College and St. Thomas More Collegiate. Finding that charitable assets are not immune from execution, the liquidation was approved by the courts.[292] This decision has been criticized on the basis that if their assets are at stake, charitable organizations will see a decrease in donations, resulting in an impaired ability to do their good works in the community.[293]

A similar concern was raised in the *Bazley* v. *Curry* case before the Supreme Court of Canada, in the context of whether the same rules for vicarious liability should apply to non-profit institutional defendants. The Court responded to this argument as follows:[294]

> I cannot accept this contention. It is based on the idea that children like the respondent must bear the cost of the harm that has been done to them so that others in society may benefit from the good work of non-profit organizations. The suggestion that the victim must remain remediless for the greater good smacks of crass and unsubstantiated utilitarianism. Indeed, it is far from clear to me that the "net" good produced by non-profit institutions justifies the price placed on the individual victim, nor that this is a fair way for society to order its resources. If, in the final analysis, the choice is between which of two faultless parties should bear the loss – the party that created the risk that materialized in the wrongdoing or the victim of the wrongdoing – I do not hesitate in my answer. Neither alternative is attractive. But given that a choice must be made, it is fairer to place the loss on the party that introduced the risk and had the better opportunity to control it.

As noted earlier in this report, the Committee supports this position, and is of the view that the same holds true in the context of liquidating assets to allow plaintiffs to realize upon their judgments.

Even where defendants do have sufficient assets, there are currently few options for allowing a plaintiff to secure such assets prior to judgment, in order that there will be something to realize upon in the event the plaintiff is successful. Pre-judgment garnishment is available only where the civil action is to recover a debt, or a liquidated claim for damages. As sexual assault claims

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292. *Re Christian Brothers of Ireland in Canada,* (1998) 37 (O.R.) (3d) 367 (Ont. Ct. Gen. Div.), *aff'd.* (2000), 47 O.R. (3d) 674 (Ont. C.A.), leave to appeal denied [2000] S.C.C.A. No. 277 (Q.L.). *See also Rowland et al.* v. *Christian Brothers et al* (2000), Vancouver A981297 (B.C.S.C.), which considered the related issues of who owns the shares of the schools, and the nature and scope of the trusts under which the shares are held. This decision is under appeal to the BC Court of Appeal.

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293. For example, Marni Whitaker, chair of the Canadian Bar Association (Ontario) charity law section, raised this point in an interview with the *National Post,* "Charities fear ruling will scare off donors" (25 January 2001). The CBA later clarified that Ms. Whitaker was not speaking on behalf of the organization or its Ontario Division.

294. At para. 54.

are actions for damages, such pre-judgment remedies are currently not available. Rather, sexual assault survivors are limited to post-judgment execution remedies,[295] including garnishment or attachment of a defendant's bank account or wages, and execution against the defendant's land and personal property.

Where there is a likelihood that the defendant is about to remove assets from the jurisdiction to avoid a possible judgment, a mareva injunction may be available.[296] However, mareva injunctions are extraordinary remedies, and although theoretically available, they have been granted in only a couple of sexual assault cases. Moreover, while fraudulent conveyances of property by defendants can be set aside by the courts,[297] a plaintiff may still be in the position where the defendant's assets have been otherwise depleted during the course of often lengthy litigation, leaving the plaintiff with little or nothing to collect upon.

From the defendant's perspective, pre-judgment remedies are an exception to the general rule that there should be no execution before judgment. The competing interests at stake are the defendant's right to enjoy assets that are free from encumbrances, versus the plaintiff's interest in being able to realize upon a judgment once it is issued.

The Law Reform Commission of B.C., after considering these competing interests, recommended that pre-judgment remedies be broadened by permitting plaintiffs to register a "notice of action" against land owned by the defendant,[298] and by making pre-judgment garnishment available to all plaintiffs seeking a money judgment.[299] According to the Commission, the rationale for pre-judgment remedies[300]

> is that, in the absence of the remedy, there is a substantial danger that the judgment will prove to be unenforceable and the plaintiff will be deprived of the fruits of the litigation. But if this is the true justification, it does not make sense to draw any distinction between a plaintiff whose claim is based on debt and a plaintiff who claims damages. Both may be equally insecure and in need of the remedy.

295. *See Pe Ben Industries* v. *Chinook Construction & Engineering*, [1977] 3 W.W.R. 481 at 486 (B.C.C.A.).

296. *See Aetna Financial Services Ltd.* v. *Feigelman*, [1985] 1 S.C.R. 2. In addition to this risk, the plaintiff must prove that she has a strong *prima facie* case, making full and frank disclosure of all material matters in her knowledge, including the possible defences to the claim. The plaintiff must also provide an undertaking in damages in the event that the claim ultimately fails, or the injunction was unjustified.

297. *Fraudulent Preference Act*, R.S.B.C. 1996, c.164, s. 9.

298. Law Reform Commission of British Columbia, *Report on Execution Against Land* (LRC 40, 1978) at 31.This proposed remedy was subject to certain qualifications and safeguards.

299. Law Reform Commission of British Columbia, *Report on Attachment of Debts Act* (LRC 39, 1978) at 34. Again, this proposed remedy was subject to certain qualifications and safeguards. The *Attachment of Debts Act* has now been replaced by the *Court Order Enforcement Act*.

300. *Ibid.*

Neither of these recommendations has been implemented to date. We believe that the rationale for these recommendations remains persuasive today, particularly in sexual assault cases. Those who sexually abuse children and other vulnerable individuals are skilled at taking advantage of others and avoiding responsibility. When faced with being forced to pay their victims compensation, many will take steps, including unlawful ones, to avoid the consequences of their actions. Where the defendant's liability is not intentional, and particularly where the defendant is an institution, pre-judgment remedies may not be required to the same extent due to the availability of insurance coverage, and the decreased possibility of depletion of assets. At the same time, we have maintained throughout this report that the basis of liability is normally an insufficient ground to treat defendants differently. We see no reason for departing from this principle in the context of this issue.

Recommendation # 29

We reiterate the recommendation of the Law Reform Commission of BC that the government of BC should amend the *Court Order Enforcement Act* to make pre-judgment garnishment available to plaintiffs in sexual assault actions, and to permit plaintiffs to register a "notice of action" against land owned by the defendant(s).

5. Insurance

(a) Introduction

A recent trend in civil claims for sexual assault is for defendants to involve their liability insurers in the litigation. This may involve both individual defendants, relying on their homeowner, rental, or professional liability policies, and institutional defendants, relying on their commercial policies. The involvement of insurers may occur in two ways. First, a defendant may seek to have its liability insurer defend the claim arising out of the sexual assault. Second, the defendant may seek indemnity under its insurance policy for any award of damages made to the plaintiff. This trend also has implications for plaintiffs, who may seek to frame their actions so as to make indemnification of the defendant, and collection on their judgment, more likely.[301] The existence of liability insurance covering the events being sued on may be an important economic factor in determining whether a sexual assault action is worthwhile. On the other hand, it has been argued that "[t]he economic tension between insurer and institution in litigation involving sexual abuse may well complicate and prolong the proceedings, which may not do the victim or the institution any good at all."[302] This is a complex area in which a number of issues arise.

(b) Policy Issues

301. *See* J.A. McLeish, "Sexual Assault - Finding the Deep Pocket: Creative Ways to Tag Insurers and Institutional Defendants" (Seminar for Trial Lawyers Association of BC, April 1993).

302. *See* R. Bell, "Sexual Abuse and Institutions: Insurance Issues" (1995), 6 C.I.L.R. 53 at 55.

Important policy issues arise in relation to insurance coverage for sexual assault. What is the appropriate balance between ensuring a source of funds to compensate the plaintiff, and the policy reasons for maintaining that sexual abuse should not be an insurable risk? Are there reasons why liability insurers should not be entirely free to exclude coverage for sexual assault? Alternatively, and in light of the example of compulsory motor vehicle insurance, would it be fair and reasonable to require institutions to take out, and insurers to provide adequate coverage to, institutions for negligence and vicarious liability for sexual assault, while retaining the exclusion for intentional injuries? Would an average homeowner expect to be insured against sexual assault? Similarly, was there any expectation of coverage for sexual assault in an institutional setting when insurance contracts were entered into in the past?[303] Is sexual assault a risk that an insured would want or expect to share with other policy holders?[304] What implications would flow for deterrence if perpetrators of sexual assault could take advantage of insurance? Similarly, would institutions maintain the same levels of accountability if sexual abuse at the hands of their employees and volunteers was insured?

Of our initial consultants, only the FREDA Research Centre on Violence Against Women and Children expressed any views on insurance policy issues. FREDA noted as follows:

> Given that the defendant's ability to pay may severely limit the number of survivors for whom civil remedies are feasible, recommending that the coverage provided by homeowner and commercial insurance policies be extended to compensate survivors of sexual assault and child sexual abuse would seem positive.
>
> Similarly, ensuring the availability of adequate compensation in the event of successful civil litigation may also be the basis for constructing a strong argument for the provision of publicly-funded insurance for survivors of sexual assault, and demanding that every institution that cares for those vulnerable to sexual assault or abuse take out liability policies.
>
> However, there remains the danger that reducing such litigation to a battle between a survivor and an insurance company may result in the perception, especially in the case of an institution and its employees, that sexual assault of women and/or the sexual abuse of children is just a business expense rather than a serious crime with consequences. In other words, any punitive value in a case in which an insurer is the one paying the damages rather than the perpetrator may be severely diminished.

Many of the same points were raised at our January consultation session. The assumption that the existence of liability insurance will reduce litigation to a battle between a survivor and an insurance company and thus deprive the suit of a moral or deterrent quality may be questioned. Institutional liability insurance for negligence or vicarious liability may well provide incentives in the form of pressure from insurers for institutions to review and improve their screening and monitoring processes for staff. Neither the institutions nor their insurers want to face actions for

303. This issue is raised by Bell at 67, citing H. Cardwell, Regional Claims Manager with Royal Insurance.

304. This issue was raised in *Rodriguez* v. *Williams*, 713 P.2d 135 at 137 (Wash. App. 1986), as cited in Bell at note 1.

sexual abuse, and insurers will usually have and may well be prepared to use the tools for registering their concern and disapproval of the records of institutions where they suggest laxity. Coverage can be terminated and premiums adjusted, as well as more onerous reporting requirements introduced. Viewed in this light, there is no reason why insurance should have the effect of shrouding the seriousness of sexual abuse.

(c) Coverage Issues

Homeowner and commercial policies typically include insurance coverage for damage to property, or bodily injury to the person. Such policies may be claims based, and provide coverage for claims made during the policy period regardless of when the acts leading to the claims took place, or occurrence based, whereby coverage is provided for bodily injury occurring during the policy period regardless of when the claim is made.[305] It is now beyond doubt in Canada that "bodily injury" includes coverage for psychological harms and disorders.[306]

One coverage issue meriting attention is that of lost insurance policies. In cases of childhood sexual assault, where civil actions often come before the courts many years after the abuse, insurance policies may be difficult to locate. If the insured is unable to prove either the existence or the material terms of the policy, then insurance coverage is unlikely to be afforded.[307] However, courts will allow the insured to bring in secondary or extrinsic evidence, for example, the testimony of brokers, correspondence, payment of premium receipts, and standard form policies used by the insurer at the time, to prove the existence and material terms of the policy.[308]

Another coverage issue which may arise in sexual assault cases is that of multiple policies. Where multiple occurrence based policies cover the time period during which sexual assaults are claimed to have taken place, there are different possibilities as to which policy might apply. While Canadian courts have not yet fully grappled with the issue of multiple policies,[309] there has been significant litigation in the United States on this issue. A number of alternative theories, known

305. S.J. Page, "Defending the Claim: Guidelines for Institutional Defendants" in *Civil Liability for Sexual Assault in an Institutional Setting* at 21.

306. *See* for example *Wellington Guarantee* v. *Evangelical Lutheran Church in Canada* ,[1996] 9 W.W.R. 373 at 385 (B.C.C.A.), leave to appeal denied [1996] S.C.C.A. No. 322 (Q.L.).

307. *See Surrey (District)* v. *General Insurance Co. of Canada*, [1994] 7 W.W.R. 226 (B.C.S.C.), *aff'd* [1996] 7 W.W.R. 48 (B.C.C.A.).

308. Grace and Vella (2000) at 308-309.

309. Trigger theories have been considered by BC courts in three cases, none of which involved sexual assault. *See Cansulex* v. *Reed Stenhouse*, (1986) 70 B.C.L.R. 273 (B.C.S.C.), in which the continuous exposure theory was given approval; *Privest Properties* v. *Foundation Co. of Canada,* (1992) 6 C.C.L.I. (2d) 15 (B.C.S.C.), in which it was held that the theory to be applied should be determined based on the facts of a particular case; and *Allstate Insurance Co. of Canada* v. *Axa Pacific Insurance Company* (23 July 1998), Vancouver C963705 (B.C.S.C.), where the injury-in-fact theory was applied, based upon the wording of the insurance contract at issue.

as "trigger theories," have been applied, all dealing with the question of what constitutes an "occurrence." According to the "first encounter" or "exposure" theory, a series of incidents is treated as one occurrence, and the policy in effect at the beginning of the occurrence applies. According to the "continuous exposure" approach, the date of the occurrence is a continuous period from the date of first exposure to the date the harm is manifested. Third, the "manifestation" theory holds the date of occurrence to be that when the plaintiff first knows or ought to know that injury or damage has occurred. Lastly, the "injury in fact" theory states that the date of occurrence is that on which bodily injury actually occurs.[310]

Ultimately, different trigger theories may be more or less beneficial, depending on the facts and chronology of a given case. In our view, the appropriate theory in sexual assault cases is the "continuous exposure" theory, which relates coverage to what may be a sequence of events causing harm and accommodates situations in which harm may not manifest itself until much later than the cessation of the abuse. Hilliker notes that in a jurisprudence where no less than four different theories have been floated by the courts, the "continuous exposure" theory "may be favoured for reasons of public policy, in that by involving a number of insurance policies the greatest amount of coverage will be brought to bear in a particular case."[311] This seems particularly pertinent to cases of sexual assault. Sexual assault litigation often exhibits multiple instances of interference and abuse, problems of incremental harm, and lack of knowledge by the survivors of the physical and mental effects of abuse over long periods of time. To choose a theory which stresses just one point in time would likely have the effect of barring the way of sexual assault victims to sources of compensation flowing from the liability policies of institutional or even personal care givers.

Although Canadian jurisprudence on triggering theories is slim, the use of the "continuous exposure" theory was approved of in passing by McEachern, C.J. in *Cansulex Ltd.* v. *Reed Stenhouse Ltd.* in cases involving "causation [of damage or injury] by way of a continuous process," i.e. incremental harm and situations in which damage or injury were slow to manifest themselves.[312] Although the context of the comments was incremental damage by a toxic cargo, the onset of asbetosis, and the insidious effect of ingesting a defective drug, sexual assault often displays features similar to those situations in which causation is a continuous and insidious process.

310. G. Hilliker, *Liability Insurance Law in Canada*, 2nd ed. (Toronto: Butterworths, 1996) at 154-155.

311. *Ibid.* at 155.

312. (1986), 70 B.C.L.R. 273, referring with approval to reasoning in *Sandoz Inc.* v. *Employers' Liability Assurance Corp*. 554 F. Supp. 257 (U.S. Dist. Ct. 1983).

Recommendation # 30

In establishing the appropriate period of coverage by occurrence insurance policies in sexual assault cases, the "continuous exposure" theory should be invoked.

Another coverage issue relates to exclusions. Insurance coverage is typically excluded for intentional injuries, or injuries caused through intentional acts by, or at the direction of, "an" or "the" insured. Many current insurance policies explicitly exclude coverage for injuries arising from sexual abuse.[313] On the other hand, some institutions have insured themselves specifically against claims for sexual abuse.[314] These latter types of policies have not yet been tested by litigation.

The wording of the policy becomes highly relevant in terms of whether the injuries flowing from sexual assault will or will not be excluded from coverage. In addition, the court's conceptualization of the harm inherent in sexual assault may be critical here.

In two recent cases, the Supreme Court of Canada considered the applicability of "intentional act" exclusion clauses. The cases were related by an underlying action, in which a woman claimed damages from 2 bus drivers for sexual assault. The defendants, Sansalone and Scalera, sought to have their insurers defend the action. The BC Court of Appeal held that coverage under both defendants' policies was excluded, and thus there was no obligation for their insurers to defend the actions.[315] This decision was upheld by the Supreme Court of Canada. McLachlin, J., for the majority, held that "the law will not permit a defendant in an action for sexual battery to say that though he might be found to have committed the battery, he did not intend any harm ... Either the plaintiff consented, in which case no action lies, or she did not consent and the defendant is deemed to have intended to injure her. In neither case does the policy provide coverage."[316] The decisions in these cases preclude an insured from claiming entitlement to a defence by the insurer by dressing up what is clearly an action in sexual assault by the plaintiff as negligence or some other form of unintended conduct.[317]

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313. Page at 15.

314. In "Lawsuit insurance bought" *Vancouver Sun* (January 19, 1989) A14, Bernard Daly of the Canadian Conference of Catholic Bishops "confirmed some dioceses now have liability insurance to protect the church from lawsuits brought by sexual abuse victims," although there is no policy to this effect. Jennifer Leddy of the Conference advised that each diocese is responsible for the decision whether to seek insurance against sexual abuse.

315. *Sansalone* v. *Wawanesa Mutual Insurance*, (1998) 158 D.L.R. (4th) 385 (B.C.C.A.). The decision was 2:1.

316. *Non-Marine Underwriters, Lloyds of London* v. *Scalera* at para. 44. *See also Sansalone* v. *Wawanesa Mutual Insurance Co.,* 2000 SCC 25*,* the companion case to *Scalera*.

317. Grace and Vella at 303-304.

Another coverage issue relates to who is insured. This issue arises where more than one defendant is sued, and both are covered by the same insurance policy. Where the cause of action involves unintentional conduct, one would expect that coverage would be available. However, the language of the policy may exclude coverage in some cases.

In *W.(T.)* v. *W.(K.R.J.)*, the court held that an insurance policy which excluded coverage for intentional conduct by "an insured" excluded the insurer's obligation to indemnify, and thus to defend, a sexual assault action against a non-offending care-giver who had been sued for negligence and breach of fiduciary duty, along with the perpetrator. Although the policy was held by both parties, the court reasoned that "an insured" meant "any insured;" thus, the step-father's intentional conduct excluded both insured persons from coverage. A second policy, however, excluded coverage only for the intentional acts of "the insured." The court found that this exclusion only applied to the step-father. Thus, the insurer would be obliged to defend the action in relation to the claim against the mother for the time period covered by this policy.[318]

In the case of institutional defendants, insurance coverage may be available for claims based in negligence, breach of non-delegable duty, vicarious liability, and / or breach of fiduciary duty. Depending upon the wording of the policy in question, coverage may or may not be available to the individual officers, directors, employees, and volunteers of the institution in question.[319]

In the case of institutional defendants in sexual assault cases in British Columbia, insurance coverage is in place for claims based in negligence and vicarious liability. For institutions operated by Regional Health Boards, insurance covering negligence and vicarious liability is provided by the Risk Management Society under the Health Care Protection Program. The limits are standard for all types of institutions. Private care facilities are required to carry liability insurance covering negligence and vicarious liability. This can be secured for private insurers. Most have taken out policies with the PriCare Insurance Group. In the case of these institutions, policy limits may vary.

Although it is entirely satisfactory that institutions providing care to vulnerable groups - children and those with disabilities, for example – are required to carry liability insurance covering negligence and vicarious liability, the Committee believes that all such coverage should be standard and adequate in terms of its coverage and limits. There is no good reason for distinguishing between regional health boards and private facilities in this regard. Those who receive care in these facilities and their families are entitled to expect that all such institutions are

318. (1996), 29 O.R. (3d) 277 at 282 (Ont. Gen. Div.) at 285-287, 291-292. The insured mother was denied coverage under the policy on the facts because none of the sexual abuse took place during the period it was in force.

319. *See* Hilliker at 114-121.

fully covered by schemes or policies with limits adequate to satisfy damage awards in sexual assault cases.

Recommendation # 31

The provision of insurance with standard coverage and limits for negligence and vicarious liability for all institutions providing care to children and other vulnerable groups in British Columbia should be secured by legislation or administrative regulation.

F. Criminal Injuries Compensation

The area of criminal injuries compensation is closely linked to civil remedies for sexual assault. Given that individual perpetrators are not likely to be covered by insurance for sexual assault claims and may be impecunious, it is important that another source of compensation exists. However, concerns have been raised about whether criminal injuries compensation goes as far as it could in providing an alternative source of compensation for survivors of sexual assault. In our consultations, it was noted that criminal injuries compensation awards are often too low, seem arbitrary, and don't cover all areas of loss. Another problem is that compensation is limited to events occurring after 1972, leaving out many survivors of childhood abuse. A third area of concern is that staff may have inappropriate levels of training to equip them for dealing in a sensitive manner with survivors of sexual assault.

The Law Commission of Canada made several recommendations in relation to criminal injuries compensation: that extended limitation periods apply in cases of childhood abuse; that survivors not be refused compensation for failing to report the abuse or cooperate in an investigation; and that more information be made available to complainants about the framework for determining awards and the awards made in other cases.[320]

While the Committee did not raise any issues for discussion on criminal injuries compensation in our Working Paper, we cannot ignore the fact that several of our commentators believe this is an area of importance for survivors of sexual assault. We agree that the criminal injuries compensation system is beneficial in its recognition of society's shared responsibility for taking care of victims of crime, particularly in view of the crucial role many of them play in the criminal justice system. We support the continued existence of the criminal injury compensation system, including the jurisdiction to award survivors lump sums for pain and suffering, in addition to compensation for counselling and special damages. We urge the government of BC to maintain and expand its commitment to the criminal injuries compensation system.

320. See Law Commission of Canada, *Restoring Dignity* at 203. Feldthusen et al also reviewed criminal injuries compensation programs, focusing on the system in Ontario (at 105-112).

Recommendation # 32

The Government of BC should maintain and expand its commitment to the criminal injuries compensation system. Particular attention should be devoted to limitations and process issues, the level and criteria for awards, and the training of personnel.

Part VI. Summary of Recommendations

Recommendation # 1

In cases where multiple actors have committed sexual assault against a plaintiff, either taking advantage of or increasing the plaintiff's vulnerability to sexual assault, the tortfeasors should be held to have materially contributed to the plaintiff's injuries unless they can persuade a court that in the circumstances the elements of the harm are severable.

Recommendation # 2

Tortfeasors should be held to have materially contributed to the plaintiff's injuries arising from multiple instances of sexual assault in accordance with Recommendation 1, regardless of their basis of liability.

Recommendation # 3

Courts in BC should establish a conventional award for damages for the inherent harm of sexual assault, which should be awarded to all plaintiffs upon proof of liability, without need for proof of consequential injuries, and regardless of the basis of the defendant's liability.

Recommendation # 4

The cap on non-pecuniary damages should not apply in sexual assault cases, regardless of the basis of the defendant's liability.

Recommendation # 5

Yeo v. *Carver* should be treated as a conventional damage award for cases of childhood sexual assault in BC. To the list of factors enumerated in *Yeo* as relevant to finetuning the award should be added the following: the presence of a sincere apology by the defendant; the impact of the abuse on the plaintiff's gender identity; the plaintiffs' vulnerability at the time of the abuse; the presence of multiple forms of abuse; and whether the sexual assault was committed in circumstances of oppression on the basis of sex, race, culture, ability, class, sexual identity, or other personal characteristics.

Recommendation # 6

The Canadian Judicial Council, the Canadian Institute for the Administration of Justice, and provincial and territorial chief justices should create and deliver training programs for judges on the inherent harm and consequent injuries in sexual assault cases, including the compounded and unique nature of harm which flows from the plaintiff's gender, race, culture, ability, class, sexual identity, or other personal characteristics, as well as the diversity of ways in which plaintiffs may present as survivors of sexual assault.

Recommendation # 7

The BC Court of Appeal should, in an appropriate case, establish a benchmark for damages for adult victims of sexual assault. The benchmark should include an appropriate conventional award for damages which recognizes the inherent harm of sexual assault, along with the factors which would be relevant to establishing damages for consequential injuries in the circumstances of individual cases.

We recommend that the following factors be considered as relevant to consequential injuries: presence of a trust relationship between the plaintiff and defendant; whether the assault occurred in the plaintiff's home; the plaintiff's vulnerability to the assault; the defendant's lack of remorse; the presence of a sincere apology by the defendant; the nature of the assault; the frequency and duration of the assault(s); the degree of violence and coercion used, including the use of a weapon or threats; the physical pain and mental suffering associated with the assault; and whether the sexual assault was committed in circumstances of oppression on the basis of gender, race, culture, ability, class, sexual identity, or other personal characteristics.

Recommendation # 8

The defendant's basis of liability should not be the governing factor in assessing non-pecuniary damages in sexual assault cases. A conventional award for damages should apply regardless of the basis of the defendant's liability.

Recommendation # 9

Aggravated damages should be assessed separately from general non-pecuniary damages in sexual assault cases. The conduct of each defendant should be assessed separately, with no absolute bar against aggravated damages where the defendant's conduct amounts to an unintentional tort.

Recommendation # 10

The courts should consider the following factors relevant in assessing whether, and in what amount, aggravated damages should be awarded in sexual assault cases: victimization or oppression on the basis of gender, race, culture, ability, class, sexual identity, or other personal characteristics; the presence of a trust relationship between the plaintiff and defendant; and, if the defendant is a state actor, any breach of the *Charter*.

Recommendation # 11

The courts should continue to adopt a flexible approach in assessing whether punitive damages are appropriate in cases where there have been criminal sanctions.

Recommendation # 12

A defendant's ability to pay, and basis of liability, are important factors in assessing whether and in what amount to award punitive damages. It should not operate as an absolute bar that the defendant's liability was based on an unintentional tort, or in equity. Where the defendant's conduct is found to be deserving of an award of punitive damages, the amount of the award should be one which will serve as an effective deterrent, and should be in line with awards made in other cases.

Recommendation # 13

In awarding damages for sexual assault for conduct which is characterized as both a tort and a breach of fiduciary relationship, courts should recognize the intensification of harm to survivors abused within a relationship of trust under the head of aggravated or punitive damages. Where a claim is brought for breach of fiduciary duty alone, courts should give equitable damages their most fulsome interpretation in the circumstances, guided by the conventional awards and factors applicable in the case of common law damages.

Recommendation # 14

Further study and analysis should be undertaken of the responsibilities of fiduciaries such as the Crown in the context of sexual assault litigation.

Recommendation # 15

In awarding damages for sexual assault for conduct which is characterized as both a tort and a breach of the *Charter*, courts should recognize the intensification of harm to survivors abused within this context under the head of aggravated or punitive damages. Where a claim is brought for breach of the *Charter* alone, courts should give *Charter* damages their most fulsome interpretation in the circumstances, guided by the conventional awards and factors applicable in the case of common law damages.

Recommendation # 16

Lawyers and courts should continue to develop and apply approaches to the use of statistical earnings tables and contingencies for loss of future earnings, which avoid perpetuating bias on the basis of gender, race, culture, class, ability, and other bases of disadvantage.

Recommendation # 17

Judges should take full account of the economic aspects of harm in sexual assault cases, and the importance of accepting expert evidence in this area.

Recommendation # 18

In appropriate sexual assault cases, courts should award damages for loss of homemaking capacity and loss of family income, without reductions for gender-based contingencies. Wherever possible, each head of pecuniary damages should be particularized.

Recommendation # 19

In the context of a broad review of the *Family Compensation Act*, the Government of BC should amend the *Act* to permit secondary victims of sexual assault to seek compensation through the civil justice system. Courts should interpret the principles at play in these cases in favour of awarding damages to secondary victims in appropriate cases.

Recommendation # 20

Survivors of sexual assault should have access to information about civil actions, including how to contact and choose a lawyer, the civil procedure, costs (financial and emotional), possible outcomes and length of the process, and alternatives. This information should be developed and provided free of cost by the BC government, Law Society of BC, Legal Services Society of BC, public legal education societies, and law schools' legal clinics.

The government of BC should provide financial resources to community organizations and survivors' groups to develop their own educational initiatives in this area.

Recommendation # 21

Support networks comprised of survivors of sexual assault who have experience with the civil justice system should be established and promoted by local social service agencies. Survivors should also have access to the names of community organizations and therapists with expertise in providing support and counselling for survivors.

Recommendation # 22

We endorse the efforts of, and encourage further initiatives on the part of, continuing legal education organizations, the Law Society of BC, and law schools to provide professional development and education programs dealing with the conduct of civil sexual assault cases.

Recommendation # 23

The Law Society of BC should amend Chapter 14, rule 5(a) of the *Professional Conduct Handbook* to replace the term "weakened state" with the term "vulnerable," and should define this term to explicitly include survivors of sexual assault, such that the recruitment of and directed advertising to survivors is restricted.

Recommendation # 24

In addition to the usual factors, courts should take into account the unique factors which may come into play in sexual assault cases, and award special costs in appropriate cases. These unique factors include the intentional nature of the conduct, the high costs of sexual assault trials, and the lack of real incentives for defendants to settle.

Recommendation # 25

Further study should be undertaken on the issues relating to the use of jury trials for civil sexual assault actions in BC, including the extent to which courts and legislatures should provide guidelines to juries for damage awards, the scope of appellate review, the availability of jury trials where the Crown is a defendant, and whether reforms are available which would make jury trials a more significant option for survivors of sexual assault.

Recommendation # 26

Further study should be undertaken on issues relating to the privacy and access to information interests of plaintiffs in civil sexual assault actions in BC.

Recommendation # 27

The government of BC should repeal section 2(e) of the *Court Order Interest Act.* If this section is not repealed, equitable pre-judgment interest should be available in sexual assault cases where a breach of fiduciary duty exists.

Recommendation # 28

Courts should award pre-judgment interest in sexual assault cases even where the events occurred prior to the enactment of the *Prejudgment Interest Act* in 1974. Where there was more than one instance of abuse, pre-judgment interest should be calculated from the middle of the period of abuse.

Recommendation # 29

We reiterate the recommendation of the Law Reform Commission of BC that the government of BC should amend the *Court Order Enforcement Act* to make pre-judgment garnishment available to plaintiffs in sexual assault actions, and to permit plaintiffs to register a "notice of action" against land owned by the defendant(s).

Recommendation # 30

In establishing the appropriate period of coverage by occurrence insurance policies in sexual assault cases, the "continuous exposure" theory should be invoked.

Recommendation # 31

The provision of insurance with standard coverage and limits for negligence and vicarious liability for all institutions providing care to children and other vulnerable groups in British Columbia should be secured by legislation or administrative regulation.

Recommendation # 32

The Government of BC should maintain and expand its commitment to the criminal injuries compensation system. Particular attention should be devoted to limitations and process issues, the level and criteria for awards, and the training of personnel.

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D. Glossary[1]

aggravated damages - a type of non-pecuniary damages, awarded to compensate a plaintiff for any additional harm to her feelings caused by the defendant's outrageous and malicious conduct.

assault - the intentional threat or attempt to apply force to, or injure another person. An intentional tort.

battery - the intentional physical contact with another person, without their consent. An intentional tort.

benchmark case - a case which sets an appropriate award for damages, and lists the factors to be considered in fine tuning the award to meet the circumstances of the plaintiff.

burden of proof - the duty of proving a fact which is in dispute between the parties.

causation - the legal doctrine which determines whether an act or omission is the cause of injury (factual causation) or closely enough connected with the injury to support liability (legal causation).

cause of action - a state of facts giving rise to the right to bring a civil action.

Charter - a part of the Canadian constitution which guarantees certain rights and freedoms to individuals in relation to the government and its many activities.

civil action - a legal action, or lawsuit, brought before the courts to redress private rights, including injuries caused by torts.

common law - law which is based upon the decisions of the courts rather than legislation.

conventional award - an award for damages which is based upon previous awards in similar cases.

costs - the expenses paid by a party to bring or defend a civil action, part or all of which may be recovered if a party is successful in the action.

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1. This glossary is based on the following sources: *Black's Law Dictionary*, 6th ed. (St. Paul, Minnesota: West Publishing Co., 1990); D.A. Dukelow and B. Nuse, *The Dictionary of Canadian Law* (Scarborough, Ontario: Thomson Professional Publishing Canada, 1991); M.R. Ellis, *Legal Process for Battered Women. A manual for Intermediaries* (Vancouver: Legal Services Society of B.C., 1997).

contingency fee - an arrangement with a lawyer whereby a plaintiff is not required to pay her legal fees unless and until her lawsuit is successful. The plaintiff must still pay costs associated with the action.

counterclaim - a claim brought by the defendant against the plaintiff, which is added to the original action.

courts - institutions which administer justice. In BC, most trials in civil sexual assault actions occur in the B.C. Supreme Court. Appeals are taken to the BC Court of Appeal, and finally, to the Supreme Court of Canada.

Crown - the federal, or a provincial or territorial government, or a representative of these governments.

damages - compensation awarded for injuries to the person, property, or rights, resulting from a tort (wrong). Damages may be non-pecuniary or pecuniary.

defendant - a person or institution against whom a civil action is brought.

duty of care - in the law of negligence, a legal responsibility to take reasonable care to avoid causing harm to another, or to take reasonable care to protect or assist another in need.

equity - a system of law which provides remedies not available under the common law, according to principles of fairness.

exemplary damages - see punitive damages.

factual causation - the issue of whether the defendant's conduct contributed to the plaintiff's injuries.

fiduciary - a person or institution in a position of power and trust towards another, who has the duty to act in good faith and in the best interests of the other.

garnishment - the enforcement of a judgment for damages against the defendant's wages, or other monies owed to the defendant.

legal causation - the issue of whether the plaintiff's injuries which have been caused by the defendant's conduct are closely enough related in time, space, sequence, and mental anticipation to support liability. Also called proximate causation.

limitation period - the period of time within which a civil action must be brought.

negligence - a breach of a duty of care by failure to take reasonable care in the circumsances, resulting in injury to another. An unintentional tort.

non-offending care-giver - a parent, or someone in the position of a parent, who fails to protect his or her child from sexual abuse.

non-pecuniary damages - compensation for pain and suffering, lost enjoyment of life, and lost amenities.

parties - the plaintiff and defendant in a civil action.

pecuniary damages - compensation for loss of earnings, the cost of care, and other economic losses incurred by the plaintiff before and after trial.

perpetrator - the person who commits a sexual assault.

personal injury action - a type of civil action in which damages are claimed for injuries to the person resulting from negligence.

plaintiff - a person who brings a civil action.

pleading - the written statements of the parties to a civil action regarding their respective claims and defences.

pre-judgment interest - interest awarded on a damages award from the time the money was owed until the time of judgment.

proximate causation - see legal causation.

punitive damages - compensation awarded to punish the defendant, and to deter the defendant and others from future wrongdoing. Also called exemplary damages.

quantum - the amount of damages.

standard of care - in the law of negligence, the degree of care that a reasonably prudent person should exercise in similar circumstances.

state actor - a government, or representative of the government, Crown corporation, or other government controlled body.

survivor - a victim of sexual assault.

tortfeasor - a wrongdoer; a party who commits a tort.

tort - conduct resulting in injury to the person or property of another, for which damages may be recovered. Includes intentional and unintentional wrongs.

vicarious liability - the responsibility of a person or institution for another's wrongdoing, based on the relationship between the two such as employer and employee.

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