The Undervaluation of Non-pecuniary and Income-Based Damage Awards in Sexual Abuse Cases: Do Gender and Aboriginal Factors Play a Role?

Susan M. Vella*

A. INTRODUCTION

A review of the reported sexual assault decisions on damages to date reveals two disturbing and seemingly entrenched trends. First, non-pecuniary damage awards are low across the board, with the vast majority of successful plaintiffs receiving less than half the personal injury cap that was established in 1978 by the Supreme Court of Canada in its damages trilogy of cases.\(^1\) Second, loss of earning capacity awards are skewed by gender, and seemingly more pronounced by race, in the situation of Aboriginal plaintiffs. The overall conclusion is that the harms which result from sexual torts are undervalued as reflected in the caselaw, notwithstanding the apparent recognition by the judiciary of the reprehensible character of the misconduct and the pervasive, lifelong nature of the harms suffered by those who have been sexually abused.

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This paper has two dominant theses. First, the assessment of non-pecuniary damage awards has been hampered by the personal injury cap. The cap was imposed after a review by the Supreme Court of Canada of policy considerations relevant to negligence-based catastrophic personal injury cases. These policy considerations are neither applicable nor appropriate to cases featuring intentional misconduct that causes the predominantly psychologically based harms associated with sexual abuse and in which significant pecuniary loss is difficult to prove. The personal injury cap is premised on the assumption that victims of negligence-based personal injury will be fully compensated by awards for pecuniary loss (future care and/or loss of earning capacity), so that the general function of non-pecuniary damage awards is to top up the real compensatory award (i.e., pecuniary loss) for the purpose of providing additional solace to the victim.

Another reason for the undervaluation of non-pecuniary damages is that the harms associated with sexual abuse (torts and fiduciary duty alike) are largely “invisible” harms of a psychological nature, historically associated with “soft” complaints, such as depression, anxiety, and stress, raised by predominantly female plaintiffs, rather than “hard core” physical injuries, such as paralysis, broken limbs, and brain (cognitive) injury. Sexual assault has historically been identified as a women’s issue, and the historical treatment by the law of “women’s issues” has not been advantageous. Learned scholars in women and the law have coined the phrase “feminization” to denote the disparate treatment of women under the law.

This early feminization of the law pertaining to civil remedies for sexual misconduct, combined with the artificial constraints imposed by the personal injury cap, have operated to constrain the courts’ valuation of the “pain and suffering” component of non-pecuniary awards issued in favour of victims of sexual abuse. As well, pecuniary loss awards have either been minimal or absent altogether, with few exceptions to date. Hence, the presumption underlying the establishment of the personal injury cap—that a non-pecuniary award is essentially a “top-up” of a substantial pecuniary loss award that already fully “compensates” the victim of accidental injury (in terms of calculable economic loss)—is not borne out in the field of civil sexual assault, as demonstrated by the statistical analysis revealed in this paper.

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While an analysis of all of the potential reasons as to why loss of earning capacity claims are more often than not denied or significantly reduced is beyond the scope of this paper, one clearly significant barrier that faces childhood victims of sexual abuse, and which does not typically confront victims (child and adult) of catastrophic personal injury to which the personal injury cap applies, is the fact that lawsuits based on childhood sexual abuse are typically not brought until many years after the victims were abused. The reasons for this delay in reporting and pursuing civil sexual abuse claims are well documented. However, the practical reality that results from this delay (created by the very nature of the insidious wrong) is that causation in damages becomes far more complicated and difficult to prove due to the passage of time and the occurrence of intervening events. The passage of time is not generally significant in the catastrophic personal injury case where an accident visibly occurs; the physical injury is often immediate and apparent (and more obviously caused by the negligent conduct), and the victim typically does not wait decades before bringing her action. The result leaves sexual abuse claimants without appropriate redress for both non-pecuniary loss and loss of earning capacity. The justification for restraining the social cost of large awards relied on by the Supreme Court of Canada to support a cap on non-pecuniary damages does not stand up when scrutinized in the light of the intentional torts, including sexual abuse, or in light of the low pecuniary loss awards, if granted, received by victims of sexual abuse.

Finally, it is noteworthy that the establishment of the personal injury cap in 1978 did not take into account the possibility of the existence of aggravating factors. While the courts have rejected a separate heading of non-pecuniary damages, referred to by some courts as “aggravated damages,” aggravating factors are appropriately considered to augment an award for “pain and suffering” beyond what the conventional caselaw would otherwise warrant to reflect the manner in which the wrongful conduct was perpetrated or responded to. In the majority of sexual abuse cases, aggravating factors are present; placing these cases in a category that justifies awarding non-pecuniary damages that are

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4 See, for example, P.D. v. Allen, [2004] O.J. No. 3042 (S.C.J.) [P.D].
greater than those awarded in conventional personal injury cases, for which the personal injury cap was developed.

Turning to the second thesis, the loss of earning capacity awards granted to date have been, with few exceptions, dismal in the sexual abuse jurisprudence. The already depressed nature of loss of earning capacity awards is exacerbated in awards made for female and Aboriginal victims by the imposition of additional or compounded discount factors that generate even lower awards than are generally made in favour of male (non-Aboriginal) victims of sexual abuse. The difference is disturbing, as revealed in the caselaw statistical analysis that follows, and, in the author’s view, unjustifiable as it is premised on discriminatory factors of gender and race, prohibited by section 15 of the Canadian Charter of Rights and Freedoms. The discriminatory factors are revealed in both the negative contingencies underlying the Statistics Canada income tables relied upon by counsel, and in the discriminatory assumptions sometimes relied upon by judges when further discounting income loss calculations based on the income tables, which can duplicate the negative impact of a gendered analysis. If, however, gender-neutral income tables were to be relied upon by counsel and the judiciary as the starting point for calculating loss of earning capacity (understanding that calculating loss of earning capacity requires more than a mere statistical income computation), the result would ameliorate some of the discrimination that pervades much of the caselaw to date. Interestingly, if gender-neutral income tables were to be used in place of the corresponding gender-specific income tables, the income reduction suffered by male plaintiffs would be relatively small compared with the more significant increase in loss of earning capacity amounts that would be awarded to female plaintiffs. The use of gender-neutral (sometimes referred to as gender-blended) income tables is a small price to pay by male plaintiffs and defendants for redressing discrimination. Furthermore, the use of gender-neutral income tables will ensure a non-discriminatory application of the common law in assessing loss of earning capacity claims, as mandated by section 15 of the Charter.

Of course, the use of gender-neutral income tables would not result in an increase in the number of earning capacity claims granted or in-

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crease the upper limit of awards granted. Rather, their use would make
the awards more equitable between female and male victims in the cases
where the difficult causation hurdle has been overcome by the plaintiffs.
Furthermore, this proposed methodology would not eliminate the trier
of fact’s role in taking into account the specific factors in evidence, such
as the career paths of the victim’s siblings or the plaintiff’s own evidence
as to what his childhood aspirations were.

This paper will conclude with a summary of proposals for redress,
including the role of substantial indemnity costs (in non-rule 49.10 situa-
tions) and the statutory mandate provided by the Victims’ Bill of Rights,
19957 for use in civil sexual abuse proceedings to enhance the amount of
compensation received by plaintiffs after payment of legal costs.

B. THE INAPPLICABILITY OF THE PERSONAL
INJURY CAP AND THE NEED TO RETHINK
THE FUNCTION OF NON-PECUNIARY
DAMAGES IN SEXUAL ABUSE CASES

1) Introduction

To date there have been approximately 220 reported decisions released
across Canada (excluding Quebec) in which plaintiffs have been awarded
damages for sexual tort and fiduciary related claims. The earliest such
reported decision is Q. v. Minto Management Ltd.,8 released in 1985. The
most recent reported case captured by this analysis is S.B. v. S.B.,9 re-
leased in 2008. The following review is broken down along gender and
Aboriginal lines, based on the reported caselaw under the heading of
non-pecuniary (including aggravated) damages. Only those cases in
which the plaintiffs were successful in establishing liability and where
damages were assessed have been included.

This paper will first review the gender breakdown of non-pecuni-
ary damage awards of all plaintiffs, including Aboriginal plaintiffs. Of a
total of 220 plaintiffs, 64 were male and 156 were female, meaning that,
to date, approximately 71 percent of the court actions (in which damages
have been awarded) have been brought by women. In the early cases,

7 S.O. 1995, c. 6.
the proportion of women to men was even larger, as male victims did not start to pursue their cases before the civil courts until more recently. Further, the vast majority of perpetrators in these decisions were male.

Figure 1: Timeline of Cases Brought by Gender

2) Survey of Non-pecuniary Damage Awards (Excluding Quebec)\textsuperscript{10}

Approximately 47 percent of male plaintiffs and 38.5 percent of female plaintiffs received awards of $50,000 or less for non-pecuniary damages. By contrast, only about 14 percent of males and 8 percent of females were awarded non-pecuniary damages in excess of $150,000. The vast majority of awards are still $100,000 or less (i.e., approximately 73.5 percent of claims in favour of males, and 76 percent of claims in favour of females). There seems to have been little recognition of the fact that the personal injury cap of $100,000 established in 1978 has been increased to reflect inflation, and is now valued at approximately $320,000 in 2008 dollars.

\textsuperscript{10} The reason for the author’s decision to exclude Quebec judgments from this analysis rests solely in the author’s lack of expertise in the civil law system to properly analyze the damage assessment process undertaken by the Quebec superior courts.
Not one sexual abuse plaintiff has received a non-pecuniary award exceeding the cap in place at the time of the making of the award.

Table 1: Gender-Specific Analysis of Non-pecuniary Damage Awards to 1 March 2008

<table>
<thead>
<tr>
<th>Award Value ($)</th>
<th>Male Plaintiffs</th>
<th>Female Plaintiffs</th>
<th>Total Plaintiffs</th>
</tr>
</thead>
<tbody>
<tr>
<td>1–50,000</td>
<td>30</td>
<td>60</td>
<td>90</td>
</tr>
<tr>
<td>50,001–100,000</td>
<td>17</td>
<td>59</td>
<td>76</td>
</tr>
<tr>
<td>100,001–150,000</td>
<td>8</td>
<td>24</td>
<td>32</td>
</tr>
<tr>
<td>150,001–200,000</td>
<td>9</td>
<td>10</td>
<td>19</td>
</tr>
<tr>
<td>200,001–250,000</td>
<td>0</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>250,001–300,000</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Totals</td>
<td>64</td>
<td>156</td>
<td>220</td>
</tr>
</tbody>
</table>

* Statistical analysis excludes all cases from Quebec jurisdiction

Figure 2: Gender-Specific Analysis of Non-pecuniary Damage Awards—All Plaintiffs (Sexual Abuse)

Turning to the situation of Aboriginal plaintiffs, there were a total of nineteen reported cases in which damages were assessed. This is still a relatively low number of cases in terms of drawing any conclusions. The reasons for this low number of cases (even before the recent approval by now Chief Justice Winkler of the Baxter class action settlement11) are

beyond the scope of this paper. More Aboriginal men than women (2:1 ratio) have pursued claims for compensation for sexual abuse before the courts. One factor explaining this finding may be the higher reported incidence of male same-sex abuse cases than female, arising from the clergy and church-official context, both “on reserve” and in the residential schools.

Table 2: Gender-Specific Analysis of Non-pecuniary Damage Awards—Aboriginal Plaintiffs

<table>
<thead>
<tr>
<th>Award Value ($)</th>
<th>Aboriginal Male</th>
<th>Aboriginal Female</th>
<th>Total Aboriginal</th>
</tr>
</thead>
<tbody>
<tr>
<td>1–50,000</td>
<td>4</td>
<td>3</td>
<td>7</td>
</tr>
<tr>
<td>50,001–100,000</td>
<td>4</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>100,001–150,000</td>
<td>3</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>150,001–200,000</td>
<td>4</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>200,001–250,000</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>$250,001–300,000</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Totals</td>
<td>15</td>
<td>4</td>
<td>19</td>
</tr>
</tbody>
</table>

Figure 3: Gender-Specific Analysis of Non-pecuniary Damage Awards—Aboriginal Plaintiffs

Notwithstanding the fact that more Aboriginal males successfully pursued claims for compensation, a far larger proportion of Aboriginal

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females received under $50,000 as non-pecuniary damages than did the males. This result is informed, in part, however, by the observation that the nature of the sexual abuse claimed by Aboriginal females tended to be of a more minor nature than was claimed by Aboriginal males. Even so, only 27 percent of Aboriginal males, and no Aboriginal females, received awards between $150,001 and $200,000, and none received an award over $200,000. Hence, overall, Aboriginal plaintiffs, and in particular, Aboriginal female plaintiffs, have fared worse than non-Aboriginal plaintiffs in an already depressed situation.

Overall, 75 percent of women and over 50 percent of men received awards of non-pecuniary damages, inclusive of aggravating factors, of $100,000 or less.

<table>
<thead>
<tr>
<th>Pain and Suffering (including aggravated)</th>
<th>Men</th>
<th>Women</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than $100,000</td>
<td>73.44%</td>
<td>76.28%</td>
</tr>
<tr>
<td>Greater than $150,000</td>
<td>14.06%</td>
<td>8.33%</td>
</tr>
</tbody>
</table>

The bottom line is that no one is receiving much monetary recognition in the civil justice system for the pervasive and lifelong psychological, emotional, and social impact of sexual abuse. Some of the reasons underlying this phenomenon will be explored in the next sections.

3) Inapplicability of the Personal Injury Cap to Sexual Abuse Claims—Rethinking the Functional Approach to the Assessment of Non-pecuniary Damages

The most significant reason why non-pecuniary damage awards have been depressed, with few exceptions, is because the majority of the jurisprudence has developed under the mindset, if not assumption, that the personal injury cap established by the Supreme Court of Canada in 1978 in the damages trilogy applies to sexual abuse cases. The cap established $100,000 as the upper limit for catastrophic (accident-based) personal injuries in 1978. Following the approach underlying the establishment of the personal injury cap has led some courts to focus too much on the number of incidents and the degree of intrusiveness (i.e., penetrative versus non-penetrative assaults) of the sexual abuse alleged, and to create ranges within which every case falling within those two

13 Supra note 2.
general sets of categories must fit, while at the same time placing too little weight on the actual severity, longevity, and types of impact in the many spheres of the victim’s functioning (including violation of dignity, physical autonomy, and sexual integrity) and the humiliating and degrading manner in which sexual abuse is perpetrated. This approach, as applied to sexual abuse cases, has lost sight of the rationale underlying the assessment of non-pecuniary damage awards articulated in the damages trilogy and labelled as the functional approach.

The Supreme Court of Canada has yet to determine whether the personal injury cap established in the damages trilogy is consistent with the functional approach to assessment of non-pecuniary damages in sexual abuse cases. However, one appellate court did consider this issue, and rejected the application of the personal injury cap to the assessment of non-pecuniary damage awards in sexual abuse cases. The court was the British Columbia Court of Appeal in its decision of S.Y. v. F.G.C. (sometimes cited as Yeo v. Carver).  


It is instructive to review the factual context and the policy issues that informed the Supreme Court of Canada’s analysis in the damages trilogy, and which resulted in the imposition of an arbitrary cap on non-pecuniary damages in catastrophic personal injury cases. It is this paper’s contention that the factual context and policy considerations underlying the damages trilogy is distinguishable from sexual abuse cases, and that the latter more closely align with the factual context and policy considerations underlying the functional approach to non-pecuniary damages articulated in defamation cases, most notably in Hill v. Church of Scientology of Toronto. Furthermore, the damages trilogy did not take into consideration the role of aggravating factors in augmenting a non-pecuniary award of damages where pecuniary loss does not fully compensate for these intangible forms of injury. In short, the personal injury cap established in the damages trilogy should have no application to sexual abuse cases when the distinct nature, longevity, and types of harms resulting from sexual abuse are examined under the functional approach to the assessment of damages at common law that are applied in accident-based catastrophic personal injury.

In the Andrews case, the plaintiff was a twenty-one-year-old man rendered quadriplegic from a car accident. Andrews required care for the rest of his life. The Court identified the “functional” approach as
the appropriate way to rationalize the monetary valuation of intangible losses, which had no monetary equivalent in the market place (e.g., loss of happiness). In this context, the functional approach served to provide “solace for his misfortune” and to make his life more endurable. The non-exhaustive list of non-pecuniary losses sought to be redressed under this category were loss of amenities, pain and suffering, and loss of expectation of life. The Court stated, “money is awarded because it will serve a useful function in making up for what has been lost in the only way possible, accepting that what has been lost is incapable of being replaced in any direct way.”

However, the Court noted that in a catastrophic personal injury case, the plaintiff was fully compensated in the sense of having money set aside to pay for, or replace, those items that were capable of monetary calculation, such as the cost of future care and loss of economic opportunity. Considered thus, damages for non-pecuniary loss are not truly “compensatory,” recognizing that the intangible losses being redressed lack a marketplace replacement cost. The Court elaborated on its meaning of “functional” in this context:

If damages for non-pecuniary loss are viewed from a functional perspective, it is reasonable that large amounts should not be awarded once a person is properly provided for in terms of future care for his injuries and disabilities. The money for future care is to provide physical arrangements for assistance, equipment and facilities directly related to the injuries. Additional money to make life more endurable should then be seen as providing more general physical arrangements above and beyond those relating directly to the injuries. The result is a coordinated and interlocking basis for compensation, and a more rational justification for non-pecuniary loss compensation.

In Thornton, the Court was faced with a comparable situation to Andrews—a young man who was rendered quadriplegic as a result of an act of negligence. The Court applied the personal injury cap and accordingly reduced the non-pecuniary damages awarded by the lower court to $100,000.

In Arnold (the third case in the damages trilogy), the facts were somewhat different. The plaintiff was a child struck by a car after buying ice cream from an ice cream truck. She suffered significant mental impairment rather than catastrophic physical impairment. The Court applied

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17 Andrews, supra note 1 at 262.
18 Ibid.
the same “functional” approach to assessing non-pecuniary damages and again imposed (and awarded) the $100,000 cap. The Court underscored the point that pecuniary awards should be sufficient to provide the necessities of life, while non-pecuniary awards are intended to top-up the already substantial and full-compensatory pecuniary loss award. The Court expressed concern that unrestricted and arbitrarily large non-pecuniary awards, when coupled with large pecuniary loss awards, would cause both an undue burden on society and large, unaffordable insurance premiums. The Court stated that “the prime purpose of the court is to assure that the terribly injured plaintiff should be adequately cared for during the rest of her life. That end having been attained, other elements of damage are of lesser importance.”

In *Lindal v. Lindal*, the Court reaffirmed the application of the personal injury cap to another catastrophic personal injury case, and reiterated the need to consider the social impact of large non-pecuniary awards when coupled with pecuniary loss. The Court observed that, in these types of cases, the trial court has already “fully compensated” the plaintiff through an award of loss of future earnings, and that damages for non-pecuniary loss are not really “compensatory,” but rather are an attempt to substitute other (effectively price-less) amenities for those that have been lost instead of compensating for the loss of something with a monetary value in the marketplace. However, the Court affirmed that the “rough upper limit of $100,000” is subject to erosion by inflationary forces, and hence it is appropriate to translate the cap into current dollars.

The cases in which the personal injury cap has been developed and applied, however, are very different from the situation presented by sexual abuse claims. First, in all of the key Supreme Court of Canada cases considered above, the wrongful conduct leading to the injuries being addressed by non-pecuniary damages was negligence. In sexual abuse claims, the wrongful conduct is intentional. Second, in the majority (if not all) of catastrophic personal injury cases, very substantial pecuniary loss awards are granted. In the vast majority of sexual abuse awards to date, pecuniary loss awards are either entirely absent or extremely modest. Cost of future care in sexual abuse cases is usually limited to the cost of therapy sessions and perhaps satisfaction of a modest OHIP-subrogated

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19 *Arnold*, supra note 1 at 320.
21 The Court again reaffirmed the appropriateness of the cap in *ter Nuezen v. Korn*, [1995] 3 S.C.R. 674 (noting that in 1995 dollars, the personal injury cap was valued at approximately $240,000). In this case the plaintiff was negligently infected with HIV during an artificial insemination procedure.
claim, and personal damages for loss of earning capacity, as will be demonstrated, are far lower than those awarded in catastrophic personal injury cases. Even in the handful of sexual abuse cases in which the largest loss of earning opportunity awards have been granted, those awards were on the low-end compared to catastrophic personal injury cases. Hence, the social impact of increasing non-pecuniary loss awards loses its force as a policy argument to restrain awards in the sexual abuse context.

Further, the “intangible” losses that the personal injury cap is intended to redress (loss of amenities/happiness, pain and suffering, and loss of expectation of life) do not capture additional forms of intangible losses that courts have recognized as associated with sexual abuse, such as the violation of the victim’s dignity, physical autonomy, and sexual integrity. The inadequacy of the personal injury cap to redress these additional forms of intangible losses has been particularly relied upon in those tort cases in which the cap has been held not to apply, notably in defamation cases.

Finally, the personal injury cap in the damages trilogy did not reflect any award of aggravated damages. As observed by the British Columbia Court of Appeal, in Huff v. Price:

\[\text{... aggravated damages are an award, or an augmentation of an award, of compensatory damages for non-pecuniary losses. They are designed to compensate the plaintiff, and they are measured by the plaintiff's suffering. Such intangible elements as pain, anguish, grief, humiliation, wounded pride, damaged self confidence or self-esteem, loss of faith in friends or colleagues, and similar matters that are caused by the conduct of the defendant; that are of the type that the defendant should reasonably have foreseen in tort cases or had in contemplation in contract cases; that cannot be said to be fully compensated for in an award for pecuniary losses... The damage award is for aggravation of the injury by the defendant’s highhanded conduct.}\]

The case of Hill is well known to the legal community. Crown Attorney Casey Hill sued the Church of Scientology for defaming his character on the front steps of Osgoode Hall. Mr. Hill was awarded non-pecuniary damages in the sum of $300,000, exceeding the personal injury cap. The Supreme Court of Canada held that the personal injury cap does not apply to limit non-pecuniary damages awarded for defamation.

In its analysis, the Court emphasized the differences between the factual scenario presented by catastrophic personal injury cases and

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22 Huff, supra note 16 at 299 [emphasis added].
23 Hill, supra note 15.
that presented by defamation cases. One such difference was the pervasiveness of the invisible harms caused by the defamatory conduct. Mr. Justice Cory eloquently described the nature of this harm: “The written words emanating from the news conference must have had an equally devastating impact . . . . A defamatory statement can seep into the crevasses of the subconscious and lurk there ever ready to spring forth and spread its cancerous evil.”

The Court thus rejected the application of the personal injury cap to claims for defamation:

In my view, there should not be a cap placed on damages for defamation. First the injury suffered by a plaintiff as a result of injurious false statement is entirely different from the non-pecuniary damages suffered by a plaintiff in a personal injury case. In the latter case, the plaintiff is compensated for every aspect of the injury suffered: past loss of income and estimated future loss of income, past medical care and estimated cost of future medical care, as well as non-pecuniary damages.

The Court further noted that in defamation cases, special damages for pecuniary loss are often “exceedingly difficult to prove.” The Court also underlined the fact that the tort of defamation is an intentional tort: “There is a great difference in the nature of the tort of defamation and that of negligence. Defamation is the intentional publication of an injurious false statement . . . . Personal injury . . . results from negligence which does not usually arise from any desire to injure the plaintiff.”

The observations by the Supreme Court of Canada, which justified a rejection of the personal injury cap in defamation cases, apply with equal force to sexual abuse cases as demonstrated, in part, by the survey reviewed in this paper, and, in part, by the observations already made by the Supreme Court of Canada, the British Columbia Court of Appeal, and various trial courts across Canada concerning the unique features of sexual abuse claims that parallel those made in *Hill*.

The apt observations made by the Supreme Court of Canada concerning the unique features of civil sexual abuse cases begin in one of its earliest decisions in the area: *Norberg v. Wynrib*. In this case, a drug addicted patient sued her doctor, who had exchanged drugs for sexual

28 Grace, *supra* note 3, for further analysis of this issue within the context of *Hill*, *supra* note 15.
favours with her. The majority held that the misconduct was sexual battery, while the minority held that the misconduct was better captured under breach of fiduciary duty. Justice McLachlin (as she then was), with Justice L’Heureux-Dubé concurring, favoured the more flexible analysis of compensation based on equitable compensatory principles over the seemingly inflexible approach under the *restitutio in integrum* principles in tort. Justice McLachlin observed that the repeated sexual encounters caused the plaintiff humiliation and “robbed her of her dignity.” Furthermore, McLachlin J. observed that “the pain of those encounters will probably remain with her all of her life . . . . While the sexual encounters lack the violence of rape, the pain may be just as great because of its insidious psychological overtones.”

In the other landmark civil sexual abuse decision released by the Supreme Court of Canada that same year, *K.M. v. H.M.*, Justice La Forest acknowledged that the psychological sequelae from incest can be “extremely debilitating.” Again, McLachlin J. and L’Heureux-Dubé J. would have assessed a higher award for damages under the rubric of equity; however, the majority rejected this approach.

These early cases set the stage for the British Columbia Court of Appeal’s decision in *S.Y.* (also known as *Yeo v. Carver*). In this case, a jury awarded a stepdaughter who was repeatedly sexually abused by her stepfather over a number years the amount of $350,000 in non-pecuniary damages (and additional amounts under other heads of damages). The court considered the appropriateness of the personal injury cap to sexual abuse cases, and held that the cap was not applicable (though it reduced the non-pecuniary award to $250,000, which was the personal injury cap at the time). Justice Macfarlane found that the policy reasons underlying the personal injury cap in the damages trilogy did not justify a similar restraint in civil sexual abuse cases:

> The policy considerations which arise from negligence causing catastrophic personal injuries, in the contexts of accident and medical malpractice, do not arise from intentional torts involving criminal behaviour. There is no evidence before us that this type of case has any impact on the public purse, or that there is any crisis arising from the size and disparity of assessments. A cap is not needed to protect the general public from a serious social burden, such as enormous insurance premiums. Insofar as damage awards may be so high as to be

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32 *S.Y.*, *supra* note 14.
wholly erroneous, or wholly disproportionate, an appellate court may intervene to correct disparity, and to foster consistency.\(^{33}\)

The court further observed that sexual abuse claims do not usually result in significant pecuniary damage awards, so there is a greater role to be played by non-pecuniary damages in providing solace to the plaintiff.\(^{34}\) Justice Macfarlane summed up the nature of these types of invisible injury as follows:

> What is fair and reasonable compensation for general damages, including aggravated damages, in this case is not easy to say. This is an evolving area of the law. 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 measurements.\(^{35}\)

In the criminal sexual assault cases of \textit{R. v. McCraw,}\(^{36}\) and \textit{R. v. Osolin,}\(^{37}\) the Supreme Court of Canada recognized that sexual abuse constitutes a deep affront to a person’s dignity and physical integrity. In the insurance case of \textit{Non-Marine Underwriters, Lloyd’s of London v. Scalera,} the Supreme Court of Canada again reiterated that one of the purposes of the law of sexual battery is to protect the individual’s physical autonomy.\(^{38}\) As Justice McLachlin (as she then was) observed, battery is a violation of the victim’s right to exclusive control of his or her person. The battery constitutes a violation of the victim’s bodily integrity and the loss is identified with the victim’s personality and freedom. Most importantly, victims of such attacks, and . . . those who identify with them tend to feel resentment and insecurity if the wrong is not compensated.\(^{39}\)

Thus, in addition to providing solace, loss of amenities, and pain and suffering (as in the catastrophic personal injury cases), damages for non-pecuniary loss in sexual abuse claims should also serve the function of redressing the victim’s personal autonomy, dignity, and physical,

\(^{33}\) Ibid. at para. 30.
\(^{34}\) Ibid. at para. 31.
\(^{35}\) Ibid. at para. 55.
\(^{39}\) Ibid. at para. 14.
The Undervaluation of Damage Awards in Sexual Abuse Cases

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These additional harms, combined with the reality that pecuniary damage awards, being generally more difficult to prove from a causation standpoint than in accident-based cases due to the lapse of time and presence of intervening factors and are not sufficiently high to provide lifelong economic security, further support the thesis that the personal injury cap ought not to apply to sexual abuse claims. The intentional nature of the wrongful conduct, the loss of childhood and innocence, the betrayal of trust, and other aggravating factors, such as the lack of evidence that insurance premiums will become unobtainable if a personal injury cap is not established and the insidious and pervasive nature of the sexual injury, all favour the conclusion that sexual abuse cases, like defamation cases, should not be subject to the personal injury cap established in the damages trilogy.

The Supreme Court of Canada recently came one step closer to confirming this thesis.

In Young v. Bella, a university student claimed damages against her social work professor and her university for negligence. The negligence action arose out of an incident where the professor read an appendix in the plaintiff’s term paper, which was not cited, as being an autobiographical account of the plaintiff sexually abusing children. Instead of asking the student for an explanation, the professor immediately reported her to the School of Social Work’s Director and to Child Protection Services. The student was able to show that the appendix was not autobiographical and was exonerated of this false allegation, but by then damage to her reputation in the social work community had been sustained, resulting in her having difficulty finding work in the field. A jury found the university and professor negligent, and awarded non-pecuniary damages in the sum of $430,000 (and total damages in the sum of $839,400). The Supreme Court of Newfoundland and Labrador—Court of Appeal upheld the decision of the jury, and the defendants/respondents appealed to the Supreme Court of Canada.

The Supreme Court of Canada ruled that the cap on non-pecuniary damages imposed in catastrophic personal injury cases did not apply to this action, and upheld the jury award. Chief Justice McLachlin and Binnie J. found that this situation was distinguishable from personal injury cases arising from an accident. The Court rejected the extension of the policy considerations underlying the cap, finding that Ms. Young’s situat-

40 McCraw, supra note 36; Norberg, supra note 29 at para. 54.
41 S.Y., supra note 14 at para. 127.
tion was more analogous to Mr. Hill’s situation in *Hill*. In the course of their reasons, the Court commented on *S.Y.*, quoting the following passage from Macfarlane J. with approval: “There is no evidence before us that this type of case has any impact on the public purse, or that there is any crisis arising from the size and disparity of assessments. A cap is not needed to protect the general public from a serious social burden, such as enormous insurance premiums.” The Court went on to say: “We leave open for consideration in another case (where the policy considerations supporting a cap are more fully developed in evidence and argument) the issue of whether and in what circumstances the cap applies to non-pecuniary damage awards outside the catastrophic personal injury context.” From this *obiter dicta*, one may safely infer that the Court is prepared to consider broadening the scope of personal injury claims for which the cap is not appropriate, including, by its reference to *S.Y.*, sexual abuse claims.

4) The Undervalued Role of Aggravating Factors to Increase Non-pecuniary Damage Awards in Sexual Abuse Claims

The courts have consistently recognized that there are often aggravating factors in sexual abuse cases. The role of aggravating factors is compensatory and, when applied appropriately, will serve to increase the award for non-pecuniary damages beyond what the case would otherwise warrant. Some courts will issue one award encompassing general and aggravated non-pecuniary damages, while others prefer to separate these headings of damages. Whichever way the court articulates its decision, non-offending employers will be vicariously liable for an award of damages that has an aggravated damages component.

It is important to note that the Supreme Court of Canada did not consider the augmenting role of aggravating factors in setting the personal injury cap in the damages trilogy. The lack of comment by the Court with respect to the potential impact of aggravating factors in the damages trilogy is not surprising since it is not likely that aggravating factors will exist in these types of accident and medical malpractice cases that are based in negligence as opposed to intentional wrongdoing. Thus, the presence of aggravating factors in sexual abuse claims is another basis

43 *Hill*, supra note 15.
44 *Young*, supra note 42 at para. 65, quoting *S.Y.*, supra note 14.
45 Ibid. at para. 66.
46 *Grace*, supra note 3 at 215–19.
for rejecting the application of the personal injury cap established by the damages trilogy.

Aggravating factors may thus be relied upon by triers of fact to increase a conventional award for non-pecuniary loss, and indeed, in appropriate cases, to surpass the personal injury cap in intentional tort cases such as sexual abuse.

It is well established that the following types of factors will attract an aggravated damages component to an award for non-pecuniary loss in sexual abuse claims:

- The abuse involved a betrayal of trust
- The frequency of the abuse
- The duration of the abuse
- The nature and severity of the abuse (including whether it was accompanied by physical violence or the threat of violence)
- The age of the plaintiff at the time of the abuse
- The intent of the defendant
- The defendant demonstrated a lack of remorse
- The defendant’s conduct when confronted with allegations of sexual abuse
- In the case of a governmental defendant, evidence that legislation to require compliance with safeguards was ignored, or that the advice of experts was not heeded
- The plaintiff was infected with a sexually transmitted disease
- In the case of a health care professional, evidence that steps were taken following the abuse in order to reduce the chance of being reported
- Misrepresentations by the defendant regarding the nature of the sexually abusive acts
- The abuse was accompanied by degrading comments or other degrading or humiliating conduct
- Failure by institutional authorities to treat subsequent disclosures of abuse with due respect and seriousness

It is noteworthy that the use of aggravated damages to reflect a betrayal of trust component as part of the sexual abuse, thus increasing a non-pecuniary damages award, is consistent with McLachlin J. and L’Heureux-Dubé J.’s views as expressed in *Norberg* and in *K.M.* that the more generous approach to assessment of damages in equity (under the rubric of fiduciary duty) is more appropriate in these types of sexual abuse cases.

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C. TAKING THE GENDER AND RACE OUT OF ASSESSMENT OF LOSS OF EARNING CAPACITY CLAIMS

1) Survey of the Reported Cases (Excluding Quebec)

A similar review of the reported cases was undertaken to analyze the awards made under a loss of earning capacity or loss of income category of damages, again along gender and Aboriginal lines. In performing the analysis of the awards made, cases in which less than $50,000 was awarded as non-pecuniary damages were excluded on the assumption that the impacts of the sexual abuse in those cases were not serious enough to have materially affected earning capacity. The exception to this rule was where, notwithstanding a low award of non-pecuniary damages, the court nonetheless awarded loss of earning capacity damages. Using this criterion, 147 cases were examined.

The overall conclusion reached was that, even with the above mentioned exclusion, no award of damages for loss of earning capacity or loss of income was ordered in nearly half (43 percent) of the cases that were analyzed.

Table 4: Gender-Specific Analysis of Pecuniary Damage Awards—Loss of Earning Capacity Awards, All Plaintiffs* (Sexual Abuse)

<table>
<thead>
<tr>
<th>Award Value</th>
<th>Total Males</th>
<th>Total Females</th>
<th>Total Plaintiffs</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Loss of Income Awarded</td>
<td>12</td>
<td>51</td>
<td>63</td>
</tr>
<tr>
<td>$1–$50,000</td>
<td>8</td>
<td>25</td>
<td>33</td>
</tr>
<tr>
<td>$50,000–$150,000</td>
<td>7</td>
<td>18</td>
<td>25</td>
</tr>
<tr>
<td>$10,001–$500,000</td>
<td>10</td>
<td>11</td>
<td>21</td>
</tr>
<tr>
<td>&gt;$500,000</td>
<td>3</td>
<td>2</td>
<td>5</td>
</tr>
<tr>
<td><strong>Totals</strong></td>
<td><strong>40</strong></td>
<td><strong>107</strong></td>
<td><strong>147</strong></td>
</tr>
</tbody>
</table>

* Includes only cases in which non-pecuniary damage awards of at least $50,000 were granted, unless loss of income awarded notwithstanding the low non-pecuniary damages awarded. Statistical analysis excludes all cases from Quebec jurisdiction.

Furthermore, under this category of damages there is a pronounced gender imbalance. Nearly half of the women awarded more than $50,000 in non-pecuniary damages received no amount for loss of earning capacity. This is contrasted with only 30 percent of the men who received no such award.

In the upper range of loss of earning capacity awards (over $150,000), approximately 32.5 percent of men received such awards as compared...
with just 12 percent of women. In the highest range of loss of earning capacity awards, 75 percent of the men received amounts in excess of $500,000, in contrast with only 1.9 percent of women.

Figure 4: Gender-Specific Analysis of Pecuniary Damage Awards—Loss of Earning Capacity Awards, All Plaintiffs (Sexual Abuse)

When we focused on the claims of Aboriginal plaintiffs, over 61.5 percent of males received no award for loss of earning capacity and only one female Aboriginal plaintiff received a loss of earning capacity award (for $30,000), though we noted the low number of cases which have gone forward to trial to date. Overall, the early cases again suggest that Aboriginal plaintiffs fare worse than non-Aboriginal plaintiffs, possibly because the courts often consider the typically impoverished conditions which many of these plaintiffs came from, created by the reserve community system established by the federal government, as a possible benchmark, suggesting that the plaintiffs would have had poor economic prospects in any event. For example, the average income of many residents of our First Nation communities in Northwestern Ontario is at or slightly above the poverty line. So, sexual abuse claimants receiving social assistance are not substantially worse off, economically, than others in their reserve communities, notwithstanding that they suffered sexual abuse.

Table 5: Gender-Specific Analysis of Pecuniary Damage Awards—Loss of Earning Capacity, Aboriginal Plaintiffs

<table>
<thead>
<tr>
<th>Award Value ($)</th>
<th>Aboriginal Males</th>
<th>Aboriginal Females</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>No loss of income awarded</td>
<td>8</td>
<td>0</td>
<td>8</td>
</tr>
<tr>
<td>1–50,000</td>
<td>2</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>50,001–150,000</td>
<td>3</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>150,001–500,000</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>&gt; 500,000</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td><strong>Totals</strong></td>
<td><strong>13</strong></td>
<td>1</td>
<td><strong>14</strong></td>
</tr>
</tbody>
</table>

* Includes only cases in which non-pecuniary damage awards of at least $50,000 were granted, unless loss of income awarded notwithstanding low non-pecuniary damages awarded. Statistical analysis excludes all cases from Quebec jurisdiction.

A review of the Aboriginal cases, therefore, showed that the majority of Aboriginal plaintiffs received either no awards or very low awards for loss of earning capacity. Specifically, 77 percent of males and one female received awards of between $1 and $50,000.

Figure 5: Gender-Specific Analysis of Damage Awards—Loss of Earning Capacity, Aboriginal Plaintiffs

![Figure 5: Gender-Specific Analysis of Damage Awards—Loss of Earning Capacity, Aboriginal Plaintiffs](image)

Table 6: Award Comparison, All Plaintiffs

<table>
<thead>
<tr>
<th>Pain and Suffering (including aggravated)</th>
<th>Men</th>
<th>Women</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than $100,001</td>
<td>73.44%</td>
<td>76.28%</td>
</tr>
<tr>
<td>Over $150,000</td>
<td>14.06%</td>
<td>8.33%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Loss of Earning Capacity</th>
<th>Men</th>
<th>Women</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than $50,001</td>
<td>50%</td>
<td>71.02%</td>
</tr>
<tr>
<td>Over $150,000</td>
<td>32.50%</td>
<td>12.15%</td>
</tr>
</tbody>
</table>
2) Section 15 of the Charter Mandates an Application of the Common Law That Requires Gender and Race to Be Removed as Material Considerations.

As demonstrated in the following tables, the difference in what “average” women earn with the same educational qualifications as their “average” male counterparts is pronounced. Taking the example of the average woman and the average man, both having attained one university degree, and, using the Statistics Canada income tables for 2000 (full-time earnings), men ages 55–64 earned $85,313 per year, whereas their female counterparts earned $50,948—a difference of nearly $35,000 per year. If we take the same category projected over lifetime earnings (present valued), a male university graduate earned over $2.1 million, whereas women earned $1.45 million—a differential of $650,000.

**Table 7: 2000 Full-Time Earnings by Gender, Level of Education, and Age—Male**

<table>
<thead>
<tr>
<th>Age Range</th>
<th>15–24</th>
<th>25–34</th>
<th>35–44</th>
<th>45–54</th>
<th>55–64</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than high school graduation certificate</td>
<td>20,917</td>
<td>31,698</td>
<td>38,019</td>
<td>40,549</td>
<td>38,923</td>
</tr>
<tr>
<td>High school graduation certificate and/or some postsecondary</td>
<td>22,564</td>
<td>35,782</td>
<td>44,434</td>
<td>48,316</td>
<td>47,236</td>
</tr>
<tr>
<td>Trades certificate or diploma</td>
<td>26,447</td>
<td>38,833</td>
<td>46,115</td>
<td>48,930</td>
<td>46,980</td>
</tr>
<tr>
<td>College certificate or diploma</td>
<td>27,058</td>
<td>41,177</td>
<td>52,458</td>
<td>56,117</td>
<td>55,043</td>
</tr>
<tr>
<td>University certificate or diploma</td>
<td>30,620</td>
<td>52,944</td>
<td>74,279</td>
<td>79,496</td>
<td>85,313</td>
</tr>
</tbody>
</table>

Source: Statistics Canada

**Table 8: 2000 Full-Time Earnings by Gender, Level of Education, and Age—Female**

<table>
<thead>
<tr>
<th>Age Range</th>
<th>15–24</th>
<th>25–34</th>
<th>35–44</th>
<th>45–54</th>
<th>55–64</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than high school graduation certificate</td>
<td>15,889</td>
<td>22,374</td>
<td>25,736</td>
<td>26,807</td>
<td>25,562</td>
</tr>
<tr>
<td>High school graduation certificate and/or some postsecondary</td>
<td>17,788</td>
<td>27,072</td>
<td>31,462</td>
<td>33,122</td>
<td>31,690</td>
</tr>
<tr>
<td>Trades certificate or diploma</td>
<td>19,095</td>
<td>25,835</td>
<td>29,904</td>
<td>31,243</td>
<td>30,031</td>
</tr>
<tr>
<td>College certificate or diploma</td>
<td>22,075</td>
<td>30,497</td>
<td>36,862</td>
<td>38,227</td>
<td>36,396</td>
</tr>
<tr>
<td>University certificate or diploma</td>
<td>25,824</td>
<td>40,616</td>
<td>52,227</td>
<td>53,821</td>
<td>50,948</td>
</tr>
</tbody>
</table>

Source: Statistics Canada

How is an advocate to deal with this statistical “reality” when the common law tells us that courts are to place injured people back in the position they would have been, but for the sexual abuse?
Table 9: Present Value of Earnings by Gender, Level of Education, and Age—Male

<table>
<thead>
<tr>
<th>Age Range</th>
<th>15–24</th>
<th>25–34</th>
<th>35–44</th>
<th>45–54</th>
<th>55–64</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than high school graduation certificate</td>
<td>154,025</td>
<td>288,141</td>
<td>268,650</td>
<td>222,231</td>
<td>169,320</td>
<td>1,102,367</td>
</tr>
<tr>
<td>High school graduation certificate and/or some postsecondary education</td>
<td>134,038</td>
<td>332,093</td>
<td>330,037</td>
<td>281,398</td>
<td>202,617</td>
<td>1,280,183</td>
</tr>
<tr>
<td>Trades certificate or diploma</td>
<td>130,341</td>
<td>362,791</td>
<td>336,300</td>
<td>272,166</td>
<td>202,986</td>
<td>1,304,584</td>
</tr>
<tr>
<td>College certificate or diploma</td>
<td>106,111</td>
<td>376,338</td>
<td>396,119</td>
<td>324,260</td>
<td>239,514</td>
<td>1,442,341</td>
</tr>
<tr>
<td>University certificate or diploma</td>
<td>126,290</td>
<td>508,780</td>
<td>588,462</td>
<td>489,442</td>
<td>420,307</td>
<td>2,133,281</td>
</tr>
</tbody>
</table>

Source: Statistics Canada

Table 10: Present Value of Earnings by Gender, Level of Education, and Age—Female

<table>
<thead>
<tr>
<th>Age Range</th>
<th>15–24</th>
<th>25–34</th>
<th>35–44</th>
<th>45–54</th>
<th>55–64</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than high school graduation certificate</td>
<td>128,846</td>
<td>220,896</td>
<td>196,75</td>
<td>161,689</td>
<td>119,798</td>
<td>827,403</td>
</tr>
<tr>
<td>High school graduation certificate and/or some postsecondary education</td>
<td>116,501</td>
<td>270,365</td>
<td>253,097</td>
<td>203,867</td>
<td>145,967</td>
<td>989,797</td>
</tr>
<tr>
<td>Trades certificate or diploma</td>
<td>111,149</td>
<td>264,011</td>
<td>239,173</td>
<td>190,341</td>
<td>142,626</td>
<td>947,301</td>
</tr>
<tr>
<td>College certificate or diploma</td>
<td>94,499</td>
<td>297,448</td>
<td>288,619</td>
<td>226,124</td>
<td>169,953</td>
<td>1,076,643</td>
</tr>
<tr>
<td>University certificate or diploma</td>
<td>107,721</td>
<td>388,548</td>
<td>410,468</td>
<td>323,821</td>
<td>222,830</td>
<td>1,453,388</td>
</tr>
</tbody>
</table>

Source: Statistics Canada

Perhaps the answer lies in the question. If we take the gender out of the statistics, and assess loss of earning capacity in gender and race-neutral terms, then we do place the person back in the place that person would have been, but for the sexual abuse. After all, as Lord Sankey pronounced in the famous Edwards case in 1930, “their Lordships have come to the conclusion that the word ‘persons’ in section 24 includes members both of the male and female sex and that, therefore, the question propounded by the Governor-General must be answered in the affirmative and that women are eligible to be summoned to and become...
members of the Senate of Canada, and they will humbly advise His Majesty accordingly."

Statistics Canada now has some gender-blended statistics to assist us with this calculation. In the gender-blended statistical example below, male plaintiffs with a university degree who are between the age of 55 and 64 would lose approximately $10,000 per year when compared with the salaries stipulated under male-specific statistics using the same criteria, while the female plaintiffs would gain approximately $24,000 a year when compared with what female-specific statistics yield.

Table 11: 2000 Full-Time Earnings by Level of Education and Age Range—Gender-Blended Statistics

<table>
<thead>
<tr>
<th>Age Range</th>
<th>15–24</th>
<th>25–34</th>
<th>35–44</th>
<th>45–54</th>
<th>55–64</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than high school graduation certificate</td>
<td>19,399</td>
<td>28,861</td>
<td>33,595</td>
<td>35,150</td>
<td>34,325</td>
</tr>
<tr>
<td>High school graduation certificate and/or some postsecondary</td>
<td>20,655</td>
<td>32,521</td>
<td>38,544</td>
<td>41,105</td>
<td>40,548</td>
</tr>
<tr>
<td>Trades certificate or diploma</td>
<td>23,765</td>
<td>34,858</td>
<td>41,577</td>
<td>44,024</td>
<td>43,078</td>
</tr>
<tr>
<td>College certificate or diploma</td>
<td>24,177</td>
<td>35,816</td>
<td>44,776</td>
<td>47,056</td>
<td>46,001</td>
</tr>
<tr>
<td>University certificate or diploma</td>
<td>27,695</td>
<td>46,723</td>
<td>64,769</td>
<td>68,727</td>
<td>74,116</td>
</tr>
</tbody>
</table>

Source: Statistics Canada

Section 15(1) of the Charter requires the common law to be applied in a manner that is non-discriminatory on the basis of gender and race (amongst other factors). This principle of common law interpretation was affirmed by the Supreme Court of Canada in RWDSU v. Dolphin Delivery Ltd., and has application even when the parties to the litigation are private (non-governmental) and there is neither government action nor legislation at issue. In other words, the common law must be interpreted and applied by the judiciary in a manner that is consistent with, *inter alia*, the equality provision of the Charter.

Section 15(1) of the Charter provides as follows:

Every individual is equal before and under the law and has the right to the equal protection of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

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Accordingly, the Charter mandates that the common law principle requiring that the law place the plaintiff back in the position she was, prior to the abuse, requires a gender- and Aboriginal-neutral assessment of loss of earning capacity. The courts have struggled with the tension between the principles of *restitutio in integrum* (“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 compensation . . .”) and the non-discriminatory application of the law in cases involving seriously injured female plaintiffs (primarily outside the realm of sexual abuse cases).

There are predominantly two ways in which female plaintiffs are treated in a disadvantaged way by some courts in the assessment of their loss of earning capacity claims. One way is through the use of gender-specific income tables and the various hidden negative contingencies that are already built into female income tables. Suffice it to say that a much larger negative contingency is already built into the female income tables generated by Statistics Canada as compared with male income tables. This compounds the wage gap even beyond the fact that men’s wages are typically higher than women’s wages in the same or comparable jobs. The second way is by the gender-based negative earning capacity assumptions that judges sometimes apply to further discount women’s future income earning capacity claims, notwithstanding the fact that these assumptions are typically already built into gender-specific income tables.

The focus in this paper is on the use of statistical income tables. As stated, by virtue of section 15(1) of the Charter, only gender-blended tables (where available) should be used in calculating loss of earning capacity whether the court is presented with a male or a female victim of sexual abuse. As demonstrated above with the gender-blended income tables by educational achievement, the decrease to the overall awards to male victims will be relatively modest as compared with the gains that will be made by female victims. Furthermore, the hidden negative contingencies will also be blended, thereby ensuring equality before and under the common law for both genders. This analysis applies with equal force

53 *Livingstone v. Rawyards Coal Co.* (1880), 42 L.T.N.S. 334 at 337 (H.L.) [*Livingstone*].


55 For a full consideration of this issue, see Adjin-Tettey, *supra* note 6.
in relation to Aboriginal individuals whose income should similarly be informed by race-neutral income tables.

The courts, however, have struggled with how to minimize the discriminatory effect of the historical workplace on working women without offending the principle that the role of pecuniary damages is to put the plaintiff back in the economic position she would have been, absent the sexual abuse. Some courts have rejected the use of male-specific income tables to inform the loss of earning capacity assessment for women. In *Tucker (Guardian of) v. Asleson*, the British Columbia Court of Appeal rejected the trial judge’s approach of applying male-specific income tables to the female plaintiff’s situation, and then applying a 60–65 percent discount from the male income tables. The court also preferred to use female income tables over the use of gender-blended income tables:

Having decided that it is not appropriate to use statistics for university educated males as a starting point for the assessment of a young female person’s damages, I have considered various other models. One model I have considered is the use of ungendered statistics if they are available. I have discarded that approach because discrete statistics are clearly the best measure we have for the present. If ungendered statistics were adopted then they should presumably be used for all young plaintiffs, and that may be unfair in some cases.

In other words, it would be unfair to male plaintiffs to use gender-blended income tables, so it is preferable to use a gender-specific discriminatory system that prejudices women (even though the adverse income impact suffered by male plaintiffs under the gender-neutral or “persons” model would be much less than the prejudice to women of using gender-specific income tables, as demonstrated above).

In *Toneguzzo Norvell (Guardian ad litem of) v. Burnaby Hospital*, the Supreme Court of Canada considered the use of gender-blended earning statistics in the assessment of lost earning capacity. The Supreme Court reversed the trial judge’s reliance on these types of tables because they had not been placed in evidence before him. However, the Supreme Court of Canada left the door open for consideration of theappropriateness of gender-blended earning statistics for a case where the proper evidentiary foundation has been laid.

Some trial courts have attempted to apply the common law consistently with the *Charter*, though the methods they have chosen have varied.

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56 1993 CanLII 2782 (B.C.C.A.).
57 Ibid. at para. 181.
One method that has been pursued is the reliance on male income statistics to assess loss of earning capacity and then the application of a discount to attempt to reflect either the personal and family circumstances of the individual or to project when pay equity will likely be achieved. The frequently used other method is simply to use gender-blended income statistics, in some cases applying a discount to reflect the individual circumstances of the plaintiff and in others applying no such discount on the basis that the contingencies are already factored into the gender-blended income statistics. One other less frequently adopted method that has met with approval before some courts is the use of female-specific income tables, adjusted to add positive contingencies that reflect the fact that the wage gap is narrowing (and will continue to do so) and that female participation rates in the full-time workforce is also increasing. These adjustments also reflect a more equitable sharing of childcare responsibilities in two-parent families than historically was the case.59

The decision of the Alberta Court of Appeal in MacCabe v. Westlock Roman Catholic Separate School District No. 110,60 highlights the tension between the equality mandated by the Charter and the historical common law principle of restitutio in integrum.61 The fact that we are dealing with a doctrine articulated in 1880, even before women were recognized as “persons” in Canada, should give one pause. Certainly, the fact that in 1985 the Charter became the supreme law of the land mandates a reconsideration of how this tort theory is to be applied in contemporary Canada.

In MacCabe, the trial court assessed loss of earning capacity for a “bright, active 16-year-old girl,” whose intended field of work was as a physiotherapist prior to sustaining her accident.62 Notably, pay equity had been achieved in this field in Alberta hospitals. The trial judge declined to apply female specific negative contingencies in calculating the plaintiff’s loss, preferring instead to apply male negative contingencies on the basis that the law was not to be used as an agent of discrimination. The Court of Appeal disagreed and reversed the decision, primarily on the basis that the plaintiff testified that it had been her (pre-accident) “ideal wish” to have four children and that she “may” have stayed home with those children until they were in school.63

59 Adjin-Tettey, supra note 6.
61 Ibid. at para. 108, quoting from Lord Blackburn’s 1880 judgment in Livingstone, supra note 53.
62 MacCabe, ibid. at para. 1.
63 Ibid. at para. 99.
The Court of Appeal acknowledged, in principle, that the common law must try to be consistent with Charter values, including equality, but, “this consistency cannot be at the expense of the fundamental purposes of compensatory damages in tort law,” and in particular the concept of *restitutio in integrum*. The Court of Appeal could see no way around the adolescent plaintiff’s evidence about her possible intended (pre-accident) future, though it acknowledged that it would be unfair to predict with certainty that, but for the accident, the plaintiff would have had four children and stayed home with each of them until they were of school age.

The Court of Appeal also acknowledged that the result may have been different had the plaintiff testified that she had no desire to have children or no intention to be absent from the workplace, stating, “[i]f that were the case, it may be inappropriate to rely on female contingencies known to have a discriminatory element.” Hence, the court reduced the loss of future earnings award to reflect female-specific negative contingencies which suggested the chance that the plaintiff would have had four children and therefore would have been absent from the workplace for some period of time while engaged in child-rearing activities.

Unfortunately, the court did not consider the gender-neutral perspective that would moderate the historical discriminatory inequities borne by women in the workforce. Nor did it consider that by so doing, and treating all persons alike, the doctrine of *restitutio in integrum* could then be consistent in its application with the equality principles mandated by the Charter.

Other courts have chosen to blunt the force of discriminatory historical forces that have prejudiced women in the workplace through a number of creative means. For example, in *Terracciano v. Etheridge*, the plaintiff’s counsel proposed that the loss of future earning capacity of a female plaintiff, rendered paraplegic after an accident, be calculated by reference to the average earnings of a male with more than one year of post-secondary education and discounted by 6 percent to replicate the anticipated earnings stream of the plaintiff’s oldest sister. The defendants had proposed the use of female-specific income statistics, reduced by 30 percent, for the possible future earnings of the plaintiff. The difference between the calculations advanced by the respective parties was vast: $1,155,000 under the plaintiff’s formula and $350,000 under the defendant’s formula. The court assessed the loss of future earning capacity

64 Ibid. at para. 107.
65 Ibid. at paras. 126–27.
66 Ibid. at para. 109.
using the plaintiff’s proposed model but fixed that sum in the amount of $950,000. The judge observed that the female-specific income tables already had embedded in them many of the negative contingencies that economists often rely on to justify further discounts, thereby replicating those negative contingencies. Furthermore, the court stated:

Indeed, it may be as inappropriately discriminatory to discount an award solely on statistics framed on gender as it would be to discount an award on considerations of race or ethnic origin. I am doubtful of the propriety, today, of this Court basing an award of damages on a class characteristic such as gender, instead of individual characteristics or considerations related to behaviour.\(^\text{68}\)

This general approach was applied by the Ontario Superior Court of Justice in Gray v. Maclin,\(^\text{69}\) which applied male income statistics to assess a female plaintiff’s claim but added a negative contingency to reflect the “reality” of the current wage-gap. However, the court noted that it “must embrace pay equity, given our fundamental right to equality as entrenched in the Constitution.”\(^\text{70}\)

The other common approach adopted by those courts, persuaded that female plaintiffs ought not to be treated in a discriminatory fashion through the assessment of loss of earning capacity, is to use gender-blended tables rather than male income statistics, which are then discounted to reflect individual circumstances of the plaintiff.

In Audet v. Bates,\(^\text{71}\) the court, in considering the loss of earning capacity of an infant girl, held that it would be inequitable to project historical wage inequities into the future, and thus eliminated the distinction between females and males in assessing these damages by using gender-blended tables.

This approach was recently adopted by the Ontario Court of Appeal in Walker v. Ritchie.\(^\text{72}\) The Court of Appeal held that in the circumstances of the case (notably that two of the female plaintiff’s career options—teaching and kinetics—were areas where pay equity had been achieved), the use of gender-blended income statistics was the appropriate base-reference to inform the lower court’s assessment. The court noted that “the gender-neutral statistics, which are a composite of male and female statistics, inherently include absenteeism from the workforce, whether

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\(^{68}\) Ibid. at para. 81.


\(^{70}\) Ibid. at para. 197.


\(^{72}\) [2005] O.J. No. 1600 (C.A.) [Walker].
caused by reason of illness, childcare or other circumstance.” The court thus upheld the trial court’s assessment.

In Paxton v. Ramji, the court based its assessment of loss of earning capacity on gender-blended income tables and applied a negative contingency to reflect the fact that pay equity has not yet been achieved.

In an unusual case, A.C. v. Y.J.C., the court was confronted with a scenario in which the plaintiffs, a brother and sister, were both emotionally and physically abused by their mother on a repeated and lengthy basis. The court adopted an egalitarian approach to the damage awards for loss of future earning capacity and rejected statistics that indicated that women will earn less than men. The court awarded $850,000 for loss of earning capacity to each sibling, on the basis that each sibling “would at least have achieved a community college level education had they had a childhood free from the abuse they endured at the hands of their mother.” No discount was applied by the court to distinguish the sister’s projected future earnings as a mirror image of the earnings of her brother.

3) The Use of Discriminatory Assumptions to Further Discount Loss of Earning Capacity Awards

Another way in which women are disadvantaged by reason of their gender is through the reliance by some courts on discriminatory assumptions that are then used to discount awards beyond what the gender-based statistics would support. Commonly, it is assumed that women will become mothers, and therefore (or so the argument goes) will not fulfill a normal (male-defined) career path, thereby warranting a discount. Just such an assumption was made to significantly reduce the loss of earning capacity award to a female RCMP officer who was literally harassed right out of her job by a male superior officer. In Sulz v. Canada (Attorney General), a female RCMP officer, who initially received excellent evaluations under two commanders but was then harassed by a third commander, eventually had to take a medical leave from her career as a direct result of validated harassment. As a result of the harassment, and an associated major depressive disorder, the plaintiff became “competitively unemployable.”

73 Ibid. at para. 47.
76 Ibid. at para. 81.
The trial judge reviewed a report that projected actuarial predictions of the plaintiff’s net present value of income (as an RCMP officer) to retirement at the age of fifty-seven to be $926,652; if she worked to the age of sixty, that amount would increase to $1,080,050.00. The assumptions underlying these calculations were straightforward: in the absence of the harassment, the plaintiff would have continued along her successful career path as an RCMP officer until retirement. The trial judge also noted that the plaintiff was ambitious, had a strong analytical ability, three years of university education, and had shown early promise in her career.

Nonetheless, the trial judge reduced the loss of earning capacity award, arbitrarily, to $600,000, on the basis that,

Even if she had not suffered from depression, she still would have had to cope with three young children while pursuing a challenging career that, of necessity, entails shift work, unpredictable hours, and the probability of transfers to other locations. Although the plaintiff’s condition was caused by the harassment that she experienced, the evidence indicates that her personality is such that the pressures of pursuing a full-time career and raising a family of three children would have weighed heavily on her. Even though she was ambitious, it is, when viewed objectively, questionable whether she would have remained with the RCMP for 35 years. That is a significant negative contingency.\(^78\)

It is hard to imagine that the same type of analysis and the accompanying steep discount would have been applied if the plaintiff had been a young father with all of the same family related challenges.

**D. PROPOSALS FOR REDRESS**

1) **Rethink the Functional Approach to the Assessment of Non-pecuniary Damages in Sexual Assault Cases**

There are now a number of cases where courts have recognized the in-applicability and unfairness of the personal injury cap to claims for non-pecuniary loss in sexual abuse cases.\(^79\) If advocates and judges alike turn their minds to assessing non-pecuniary damages as being the likely pri-


\(^79\) Since preparing this article, the Supreme Court of British Columbia released a decision on 25 June 2008 in *Singh v. Bains*, 2008 BCSC 823, in which Morrison J. rejected the application of the personal injury cap and awarded non-pecuniary damages to
mary source of compensation, and recognize that, in addition to providing solace to the victim, the damages must also reflect the violation of a person’s dignity, physical integrity, and sexual autonomy, the awards should be increased beyond the ranges currently established under the judicial mindset of the personal injury cap. In those cases where the causation hurdles are surpassed and a substantial pecuniary award is granted, judges can adjust the amount of non-pecuniary damages to reflect that circumstance.

2) Use Aggravated Damages to Enhance Non-pecuniary Damage Awards

The recognition of aggravating factors in appropriate cases of sexual abuse should translate into enhanced awards of non-pecuniary damages beyond awards for comparable “solace” in catastrophic physical injury cases. Aggravated damages are particularly apt in those cases where the harms cannot be fully compensated by an award of pecuniary damages. The use of aggravated damages to augment non-pecuniary damages beyond the personal injury cap is warranted, regardless of whether or not the cap applies, since the damages trilogy did not address the role and impact of aggravating factors in its analysis rationalizing the establishment of a personal injury cap for appropriate cases.

3) Do Not Use Gender- or Race-Based Income Tables in Assessing Loss of Earning Capacity

In Edwards, the Judicial Committee of the Privy Council in England pronounced women to be persons, just like men, and as such accorded women equal status with men for purposes of holding public office. There is no reason why women should not be treated as persons, as men are, for purpose of calculating loss of earning capacity. Indeed, the equality provision of the Charter mandates it. Section 15 of the Charter requires that courts use gender-blended statistics wherever possible to

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a victim of repeated severe childhood sexual abuse by her uncle in the amount of $325,000.

80 Since presenting this paper, the Ontario Superior Court of Justice released its decision in Evans v. John David Sproule and Toronto Police Services Board (12 November 2008), Court File No. 02-CV-238550CM2, in which the court increased the non-pecuniary damages through aggravated damages to “constitute fair compensation and go some way towards making the plaintiff whole” (para. 130) [Evans].

81 Edwards, supra note 51.
inform an assessment of this form of pecuniary loss. This also means that judges must resist placing arbitrary discounts on their assessments that are based on stereotypical assumptions historically imposed on women in terms of their ability to be full-time productive income earners, regardless of their status as mothers and caregivers.

Similarly, race-based statistics (such as income statistics collected by the Department of Indian Affairs relative to First Nation reserve territories) and stereotypical assumptions about the quality of life of Aboriginal persons must be stripped from the assessment of loss of earning capacity. Section 15(1) of the Charter mandates the application of common law in a non-discriminatory fashion, thereby requiring the removal of gender- and race-specific discriminatory assumptions and the use of gender-blended income tables wherever possible.\(^82\)

4) Role of Substantial Indemnity Costs and the Victims’ Bill of Rights, 1995

The courts have been generally reluctant to award costs to a successful plaintiff on the elevated scale of substantial indemnity costs, barring the application of Rule 49.10, unless the defendant’s conduct during the course of litigation was egregious. However, the courts have also recognized that there may be circumstances in which complete indemnification of a successful plaintiff’s costs is necessary to do justice. Sexual abuse cases fall into this category.

Rule 49.13 and section 131(1) of the Courts of Justice Act,\(^83\) provides the jurisdiction for Ontario courts to award costs on either a substantial indemnity or complete indemnity basis.

Justice Dubin, in his widely cited decision of Foulis v. Robinson,\(^84\) noted that there may be cases, aside from the general category of misconduct during the course of litigation, in which the successful party should not be put to any legal expense for pursuing her claim.

Interestingly, in Norberg,\(^85\) McLachlin J. (as she then was), writing for herself and L’Heureux-Dubé J., would have awarded costs on a solicitor-client scale (in addition to an award of punitive damages) on the basis that the sexual misconduct by the defendant-doctor towards his drug-

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82 For a similar analysis in the American context, see Martha Chamallas, “Civil Rights in Ordinary Tort Cases: Race, Gender and the Calculation of Economic Loss” (2004–05) 38 Loy. L.A.L. Rev. 1435.

83 R.S.O. 1990, c. C.43.


85 Supra note 29.
dependent patient was an egregious breach of fiduciary duty. Indeed, breach of fiduciary duty has been recognized by other courts in non-sexual abuse contexts as the type of special circumstances that can warrant an elevated award of costs.

Examples of Ontario cases in which solicitor-client costs awards were ordered to effectively indemnify the successful plaintiff on the theory that the defendant’s actionable conduct was reprehensible include Gil lis v. Eagleson 86 (lawyer breached fiduciary duty to client), McGregor v. Crossland 87 (physician found to be in gross dereliction of his duty to his patient after failing to advise her of his mistake made in the course of his negligent operation), and Badawy v. Slovak, Mann, Stockton, Henderson & Hoy 88 (lawyer breached fiduciary duty to client). The common thread in these cases, aside from the lack of a Rule 49.10 offer to settle, was the intentional reprehensible nature of the conduct of the defendant that led to the litigation.

There is no doubt that this thread runs throughout sexual assault cases, and particularly those which also involve a breach of fiduciary duty on the part of the direct perpetrator. There is no reason why a sexual assault plaintiff should not be presumptively awarded substantial indemnity client costs where the conduct in question either amounts to criminal or quasi-criminal conduct and/or a breach of fiduciary duty.

Indeed, the Ontario Legislature recognized the justice in this approach and enacted legislation in 1995 to create a statutory presumption that solicitor-client costs should be issued in favour of victims of crime who successfully pursue civil proceedings against convicted defendants. The Victims’ Bill of Rights 89 was proclaimed into force on 11 June 1996. This legislation creates a number of statutory presumptions in favour of victims of crime who pursue civil proceedings for damages arising from those crimes. 90

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89 Supra note 7.
90 Inexplicably, this statute has been underutilized by plaintiffs’ counsel. The author found only four reported decisions in which this statute was judicially considered (in relation to s. 4), of which one of the decisions cited the statute in obiter dicta; Pilon v. Janveaux, [2006] O.J. No. 887 (C.A.) [Pilon]; Stevens v. Robson, [1999] O.J. No. 1626 (C.M. Master) [Stevens]; R.L. v. Murray, [2003] O.J. No. 307 (C.M. Master) [Murray]; DiGiorgio v. Smardenka, [2004] O.J. No. 4147 (S.C.J.) [Di Giorgio]. Since I presented this paper, the Ontario Superior Court of Justice released its fifth decision in Evans, supra note 80, in which the court issued a substantial indemnity costs award of the proceedings against both the convicted offender and the institutional defendant.
The statute only applies to civil proceedings in which one of the named defendants has been convicted of a crime under the *Criminal Code of Canada*. However, once this condition is satisfied, a number of statutory presumptions apply (see sections 3 and 4 generally). Most germane to our topic are the following subsections:

3. (1) A person convicted of a prescribed crime is liable in damages to every victim of the crime for emotional distress, and bodily harm resulting from the distress, arising from the commission of the crime.

(2) The following victims shall be presumed to have suffered emotional distress:

   . . . .
   2. A victim of sexual assault.
   3. A victim of an attempted sexual assault.

4. (1) This section applies to a civil proceeding in which the victim of a crime seeks redress from a person convicted of the crime for harm suffered as a result of the commission of the crime.

   . . . .
   (6) A judge who makes an order for costs in favour of a victim shall make the order on a solicitor and client basis, unless the judge considers that to do so would not be in the interests of justice.

The costs award provision has been noted by the Ontario Court of Appeal (albeit in *obiter dicta*) to be procedural in nature, and therefore to have retrospective application. Section 4(6) has been cited as the basis for awarding substantial indemnity costs of a motion and solicitor-client costs of a trial to a plaintiff.

In considering the reach of section 4(2) of the *Victims’ Bill of Rights* (no security for costs to be issued against plaintiffs), the court in *Stevens* relied on the wording of section 4(1) to hold that the statutory bar extends to non-offending parties, providing that the convicted offender was also named as a defendant in the context of the security for costs provision of this section. Under this statutory interpretation, a substantial indemnity costs award could therefore presumptively apply against an institutional or non-offending defendant in a successful sexual assault

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92 *Pilon*, *supra* note 90.
93 *Murray*, *supra* note 90; *DiGiorgio*, *supra* note 90.
94 *Stevens*, *supra* note 90.
proceeding, providing the perpetrator is also named and was convicted of the crime that is at the heart of the civil proceeding.95

The application of section 4(6) of the Victims’ Bill of Rights could substantially improve the net position of the plaintiff in successful civil sexual assault proceedings. Thus, the legislature is acting in harmony with the pre-existing body of jurisprudence in which solicitor-client (now substantial indemnity) costs have been awarded on the basis of the dishonest nature of the misconduct giving rise to the civil proceeding, such that the interests of justice require that the plaintiff be fully indemnified for having pursued a civil action for redress.

E. CONCLUSION

As demonstrated by the analysis and research in this paper, sexual abuse awards for non-pecuniary damages and loss of earning capacity have been depressed when considered within the recognized pervasiveness and lifelong nature of the associated psychological harms. The main reasons underlying this phenomenon are the following:

1. The courts have either been slow to embrace and fully incorporate the functional approach to assessment of non-pecuniary loss of sexual abuse plaintiffs outside the personal injury cap established by the Supreme Court of Canada damages trilogy of Andrews, Thornton, and Teno, or have yet to recognize the unsuitability of the personal injury cap to civil sexual abuse claims.
2. The issue of sexual abuse has been historically characterized as a women’s issue, leading to an early feminization of the area of civil sexual abuse.
3. The harms most commonly associated with sexual abuse are largely psychological in nature, meaning that they are “intangible” harms that the law has had difficulty assessing properly.
4. Aggravated damages have been undervalued in their role of augmenting non-pecuniary damage awards where pecuniary loss does not fully compensate the victim.
5. The assessment of loss of earning capacity awards has tended to be based on gender-specific income tables that entrench the discriminatory barriers historically faced by women in the workplace, contrary to section 15(1) of the Charter.

95 Evans, supra note 80.
6. The assessment of loss of earning capacity awards has been further hampered by the application of significant additional discounts by the judiciary, which are often either merely duplicative of discounts already reflected in the gender-specific income tables, or based on purely stereotypical assumptions that operate to disadvantage women plaintiffs in a manner that is inconsistent with section 15(1) of the Charter.

7. The assessment of loss of earning capacity awards has been hampered by the lengthy passage of time that commonly occurs between the events of sexual abuse and the commencement of civil proceedings for compensation, making these claims difficult to prove.

With recent judicial pronouncements from the Supreme Court of Canada in Young96 and the Ontario Court of Appeal in Walker,97 the time is right for proactive litigation strategies that will assist the courts in ensuring that the claims of sexual abuse plaintiffs are appropriately redressed by way of meaningful damage awards that are devoid of, or at least significantly reduce, the influence of historically discriminatory factors and reflect the pervasive lifelong nature of sexual harms. Some of those potential strategies have been suggested in this paper.

96 Supra note 42.
97 Supra note 72.