

THE MEANING OF COMPENSATION IN INSTITUTIONAL ABUSE PROGRAMS

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RÉSUMÉ

Les cas de mauvais traitements en établissement comportent un préjudice personnel à la fois sur le plan psychologique et sur le plan physique. La violence physique et la violence sexuelle ont une incidence sur le sens qu'a une personne d'elle-même, sur son sens d'intégrité et sur son sens de capacité ou de pouvoir d'exister comme une personne distincte de l'agresseur. En plus des autres défis qu'elles posent, les demandes fondées sur des mauvais traitements sont difficiles à examiner dans le cadre d'un processus judiciaire ou non judiciaire, car toute tentative d'étudier les préjudices de base qui résultent du mauvais traitement doit essayer de répondre à la nature très personnelle des préjudices causés par les mauvais traitements et qui ne se traduisent pas facilement en une valeur monétaire.

. . . is power always in a subordinate position relative to the economy? Is it always in the service of, and ultimately answerable to, the economy? Is its essential end and purpose to serve the economy? Is it destined to realise, consolidate, maintain and reproduce the relations appropriate to the economy and essential to its functioning? . . . is power modelled upon the economy?¹

A. INTRODUCTION

Institutional abuse² cases involve personal injuries both at the psychological level and at the physical level.³ Physical and sexual abuse impacts on a person's sense of self,

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1. Michel Foucault, "Two Lectures" in *Power/Knowledge*, ed. by C. Gordon, trans. C. Gordon, L. Marshall, J. Mephan & K. Soper (New York: Pantheon Books, 1980) at 89.
2. Three distinct types of institutional abuse have been identified: physical, sexual or emotional; program abuse; and system abuse. Program abuse occurs when a program operates below standards or relies upon harsh techniques and system abuse occurs when the system improperly assesses, diagnoses, defines the length or treatment or removes a child because of inadequate resources. In this article I will only focus on forms of abuse that strike at the physical body. I will refer to non-consensual medical procedures, sexual abuse and physical abuse.: See, Law Commission of Canada, *Review of the Needs of Victims of Institutional Child Abuse* (Background Paper) by the Institute for Human Resource Development (Ottawa: Law Commission of Canada, 2000) at Appendix II, 5.
3. In this article, I am not dealing with the difficulties associated with validating abuse claims. This and other issues that have been faced by compensation program designers across Canada have been dealt with elsewhere by the author. In this article, I assume that a validation process has established that abuse survivors are entitled to redress.

on her⁴ sense of wholeness, and on her sense of ability or power to exist as a person apart from the abuser. Aside from other challenges, abuse claims are difficult to address through a judicial or alternative non-judicial process because any attempt to address the core injuries that result from abuse must try to respond to the highly personal nature of abuse injuries which do not easily translate to a monetary value.

1. The Problem

Typically, in non-judicial compensation programs, the institutional authorities provide some form of non-monetary package that attempts to address the personal needs of survivors with appropriate means. For example, the following non-monetary benefits can be provided to achieve personal goals:

- therapy and other health services to achieve healing;
- provision of an apology to work toward restoring relationships;
- public education and institutional reforms to prevent further abuse;
- the establishment of an historic record or memorials to acknowledge and bear witness to the abuse;
- participation in the resolution process to promote the empowerment of survivors; and,
- provision of retraining and educational opportunities to enable transformation or the recapture of lost educational opportunities.⁵

Such efforts go some way toward addressing the personal needs of survivors of abuse, at least partially because they directly address particular injuries and therefore carry a clear meaning.

The symbolic meaning of monetary compensation is more problematic. Monetary compensation is a central part of judicial remedies for institutional abuse plaintiffs, and it is at the core of many non-judicial redress programs.⁶ Compensation can be a tool to accomplish various goals, as determined by a judicial decision-maker or by bilateral negotiating parties. If the intention behind the award of compensation is not determined, the injured party will perhaps develop his own sense of what the compensation was meant to achieve. And so, though other non-monetary benefits may be geared toward healing and recovery, a monetary award may carry a meaning that does not contribute to those same goals. I will argue that unless there is a clear articulation that a monetary award does not signify a market transaction, money will tend to indicate some form of exchange for abuse injuries. I will argue that in fact, a market-based meaning that indicates a transaction has occurred may perpetuate a feeling of disintegration within the abuse survivor.

4. I use both masculine and feminine pronouns to refer to sexual abuse survivors.

5. Law Commission of Canada, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions* (Ottawa: Law Commission of Canada, 2000) at 74-95.

6. *Ibid.* at 92.

The judicial forum provides a public space for the articulation of the symbolic meaning of compensation and a rationale for the award. However, because non-judicial compensation programs are negotiated and created anew by the parties, the parties are not directed by tradition to consider the meaning of monetary awards. Even where the parties may have agreed that the institution should recognize the personal and psychological harms arising from abuse, the monetary awards themselves may be unaccompanied by any articulation to that effect. As stated by the Law Commission of Canada:

. . . attempting to achieve consistency by putting a monetary value on the different kinds or degrees of abuse can dehumanize survivors by subjecting them to formulae or tables for compensation that do not really reflect their unique experience.

. . .

. . . consistency can be even more elusive in the case of payments made through non-court based compensation processes where neither the criteria for the decision nor the amount of the awards is disclosed.⁷

The difficulty for process designers is first to recognize that some meaning must be attached to compensation. Second, they must attempt to provide equitable awards that also recognize the personal impact of the injuries.

In this article, I will point out why it is necessary to articulate the meaning of the monetary compensation that is being provided to abuse survivors. I will examine the types of injuries that are suffered by institutional abuse survivors. There will be a discussion of how these injuries have been addressed through the use of a monetary award in the judicial reasoning of *Muir v. Alberta*,⁸ an institutional abuse case involving the sterilization of the plaintiff by the Alberta Eugenics Board. I will also describe how monetary compensation has been handled in the ADR Program in Nova Scotia, which was a non-judicial program set up by the Government of Nova Scotia to respond to numerous institutional claims made by former residents of provincial youth institutions. In the next section, the work of Margaret Radin will be examined in order to describe the contested meanings that attach to monetary compensation. I will argue that, where the meaning and intention of compensation is not clear, monetary compensation may alienate abuse survivors and objectify injuries that are personal and psychic in nature. It is possible that it will leave abuse survivors with the sense that, once again, their worth has not been understood or acknowledged by the party responsible for the abuse. Although it is difficult to achieve, it is worthwhile to attempt to address injuries to the survivor's sense of physical and psychic integrity. I will conclude with some recommendations to assist program designers and parties in a dispute to articulate what a monetary award means, in order to avoid perpetuating a sense of disintegration within abuse survivors.

7. *Ibid.* at 93.

8. (1996), 132 D.L.R. (4th) 695 [hereinafter *Muir*].

B. EFFECTS OF ABUSE

1. Definition of Abuse

Dr. Shengold, a psychotherapist who deals primarily with child abuse victims, defines child abuse in contradistinction to deprivation. He states that “child abuse means that the child has felt too much to bear; child deprivation means that the child has been exposed to too little to meet his or her needs.”⁹ Dr. Shengold asserts that there are combinations of overstimulation and neglect in everyone’s development but abuse and deprivation only exist if intensity, and duration cause enough psychic damage to result in “soul murder”. Shengold defines soul murder as follows:

(soul murder) is neither a diagnosis nor a condition. It is a dramatic term for circumstances that eventuate in crime – the deliberate attempt to eradicate or compromise the separate identity of another person. . . . (I)t depriv(es) the victim of the ability to feel joy and love as a separate person.¹⁰

When damage does occur from the abuse of power such that there is “soul murder”, what are these effects?

2. Effects of Abuse

(a) Abuse

Clinical observations of the effects of child abuse on adult survivors list the following psychological impacts: depression, increased fears, sexual problems, feelings of isolation, anxiety, guilt, distrust, anger, low self-esteem, self-destructive behaviors, nightmares, sleep difficulties, nervousness, tendency to be revictimized, phobias, substance abuse, becoming easily startled, re-enactment of trauma, and aggression.¹¹ Other more general terms such as “re-experiencing”, “avoidance”, and “arousal” describe physical memories forcing their way through into consciousness, the tendency to develop coping strategies to avoid stimulus, and the symptoms whereby a person is hyper-alert, respectively. These last three terms refer generally to the psychological syndrome known as Post-Traumatic Stress Disorder.¹²

(b) Specific Effects of Abuse

From the above observations of the effects of abuse, it seems apparent that abuse affects abuse survivors’ core relationships with their bodies and their ability to cope with their physical experiences. As stated by Neeb and Harper:

. . . sexual abuse affects the relationship adult survivors have with their own bodies. The sexual invasion of the child’s physical boundaries is a profound violation of her

9. *Soul Murder: The Effects of Childhood Abuse and Deprivation* (New Haven: Yale University Press, 1989) at 1.

10. *Ibid.* at 2.

11. A. Rowan & D. Foy, “Post-Traumatic Stress Disorder in Child Sexual Abuse Survivors: A Literature Review” (1993) 6 *Journal of Traumatic Stress* 3 at 4.

12. D. Jehu, “Post-traumatic stress reactions among adults molested as children” (1991) 6 *Sexual and Marital Therapy* 227 at 228-32. See also S. Burge, “Post-Traumatic Stress Disorder in Victims of Rape” (1988) 1 *Journal of Traumatic Stress* 193 at 194-95.

sense of self. The child's first sense of competency and trust has a physical base. . . . Her body is used by the perpetrator as a vehicle for his sexual pleasure leaving the victim overwhelmed and betrayed by her body. . .¹³

Pauline Mantley, a survivor of childhood sexual and physical abuse, has written about her experiences with childhood physical and sexual abuse. She describes how she coped with the abuse by separating herself from her body:

I just blocked out what my uncle had done, and thought it would never happen again. I remember a dream I had about that time. I dreamed I was dead in my coffin, looking at myself, but not knowing it was myself lying there. I now feel that I separated myself from my childhood then. I realized dead people didn't hurt, so I feel that Pauline, the child, died at ten years of age . . . I started to leave my body to cope with the pain he was putting me through.¹⁴

Dr. Jehu, a therapist who deals with adult survivors of child sexual abuse, quotes a patient's description of dissociative behaviour:

though I was physically present during the abuse I remember feeling nothing other than the initial revulsion when I would first touch his penis and . . . he first touched me. In between, I felt or thought about nothing. I was gone.¹⁵

Further in the article he quotes another patient:

I also became aware of the frequent tendency to separate myself and to become the observer. I really had to work at sticking with myself and to feel and to know what I was doing. I became aware that my head was separate from my body . . . it was . . . some sort of overseer making sure that everything was alright but not involved.¹⁶

Abuse can force a dissociative breach between the mind and body on an abused person. The inability to effect a physical escape from one's tormentor may trigger an internal escape from bodily experiences.

In her article "Outliving Oneself: Trauma, Memory and Personal Identity"¹⁷ Susan Brison explores the impact on identity of trauma from the perspective of a rape survivor and as a philosopher.¹⁸ Though not quite analogous to childhood abuse, her analysis is important because it incorporates not only her personal and physical expertise as a survivor of rape but also her theoretical knowledge of the constructs of identity. She describes the aforementioned phenomenon of re-enacting trauma as being a sensory memory as opposed to a narrative memory of what happened. Re-enactment involves remembering the smell of the abuser's after-shave lotion, the texture of skin or hair, and other sensory stimuli associated with the act of abuse. The

13. J. Neeb & S. Harper *Civil Liability for Childhood Sexual Abuse* (Toronto: Butterworth, 1994) at 18.

14. P. Mantley with Marjorie Willison, *Silent Cries* (Lockport: Community Books, 1999) at 37-38.

15. D. Jehu, *supra* note 12 at 231.

16. *Ibid.*

17. S. Brison, "Outliving Oneself: Trauma, Memory, and Personal Identity" in D. Meyers, ed., *Feminists Rethink the Self* (Boulder: Westview Press, 1997).

18. Though Brison is not an adult survivor of childhood sexual abuse, she provides an insightful analysis into the impact of sexual assault on her sense of self.

assault on the body results in an intrusion into the physical memories that the body carries; it affects the abuse survivor's subjective perception of the world around her.

After being raped, Brison became aware that she perceived that her body had betrayed her by being vulnerable to the rape. She found that her mind could not simply carry on independently of the new turmoil concerning her body. Her physiological reactions of hyper-vigilance and physical stress were not psychological inasmuch as physical.¹⁹ Brison lost her sense of ease and safety in the world and her sense of her own power *vis-a-vis* others in her relational worlds diminished. Brison's descriptions capture the sense of violence and contravention of will that accompanies abuse. Her description of her body as betraying her self gives a sense of the separation between her will and her body's ability to defend her against the imposition of will by the rapist. Her ability to identify with her body was compromised. Her sense of physical identity has therefore been shifted as a result of the rape.

These descriptions of the effects of sexual abuse support the proposition that abuse fragments an abused person's sense of physical integrity. It creates distance between her understanding of who she is, and her body. In effect, it causes a certain degree of alienation of a person from her body and a shift in her relationship to her physical world. In "Standing for Something", Cheshire Calhoun defines loss of integrity as the "failure to regard one's own judgment as one that should matter to others".²⁰ Calhoun also examines the view that "integrity . . . is intimately tied to protecting the boundaries of the self - to protecting it against disintegration, against loss of self-identity, and against pollution by evil."²¹ Abuse breaks down the integrity of the abused person such that they cannot protect their boundaries against disintegration and they fail to recognize that their judgment should matter.

(c) *Child abuse*

Pauline Mantley describes the burden of responsibility placed on her when she was a child, by her abuser:

He killed the animals to show me how easy it would be for him to kill my younger brothers and sisters if I talked. I couldn't live with the guilt, knowing it would be my fault if he killed my family because I told on him.²²

The psychoanalyst Shengold discusses the emotional confusion that a child undergoes at the time of the abuse. Shengold states, "victims of attempts at soul murder . . . often cannot properly register what they want and what they feel, or what they have done and what has been done to them".²³ An abused person cannot process or give meaning to what has been done to him. Shengold quotes psychoanalyst Ferenczi: "When the child recovers from [the adult's sexual] attack, he feels enormously confused, in fact,

19. *Supra* note 17 at 16-17.

20. (1993) 92 *J. of Phil.* 235 at 258.

21. *Ibid.* at 254.

22. *Supra* note 14 at 40.

23. *Supra* note 9 at 3.

split – innocent and culpable at the same time – and the confidence in the testimony of his own senses is broken”.²⁴ Shengold further states that child abuse deprives the victim of the ability to feel joy and love as a separate person.²⁵ The victim’s knowledge of himself as capable of having emotional experiences as an individual distinct from the abuser is compromised. The abuser affects his basic ability to have experiences, over and above the control that the abuser has over the meaning of those experiences. In Mantley’s case, at the time of the threat to her family, she could not extricate herself from her feeling of responsibility for his possible actions. He made her feel that she could not deprive him of his desires, or she would be responsible for the repercussions.

The unpredictability of abuse also has a significant impact on a child. Mantley describes the emotional distress caused by brutality that had no foreseeable cause:

He would keep pounding me so hard that I would be in a daze and not know what the hell was going on. The scariest part of it all was not knowing what caused him to go off.²⁶

Another aspect of abuse is the control that the abuser imposes upon the abused person. Often, an extreme form of privacy, and even private communication is used by the abuser to ensure that the abused person remains compliant and upholds the secrecy of the abuse. Again Mantley’s experience provides an example of the type of control that can be exercised by an abuser:

He used various expressions and signs to make me go where he wanted, and to control what I said or did. For instance, he’d make a coughing sound, or clear his throat a certain way, to get my attention. Then he’d indicate with his eyes where I was to go . . .²⁷

In order to reinforce the privacy, secrecy and control over the abused person, the abuser may also isolate the abused person.

By this time in my life I had no friends. When I went to school, I couldn’t stop to talk to anybody because I had to get right home. My uncle timed me. . . . I never went anywhere unless my uncle was with me. He also had codes for me with his eyes, as to where to go in the house, to satisfy his needs, so no one could see the goings on. . . . I became a very skillful liar for him. There was so much terror, sadness, loneliness and isolation, but I acted as if things were fine and normal.²⁸

(d) Institutional child abuse

Total institutions have been defined in the following way:

24. *Supra* note 9 at 29.

25. *Supra* note 9 at 2.

26. *Supra* note 14 at 48.

27. *Supra* note 14 at 28

28. *Supra* note 14 at 56.

Their encompassing or total character is symbolized by the barrier to social intercourse with the outside and to departure that is often built right into the physical plant, such as locked doors, high walls, barbed wire, cliffs, water, forest, or moors.²⁹

In an institutional setting, there is a further level of control, privacy and isolation imposed upon the residents of the institution. In institutions such as the Nova Scotia School for Boys,³⁰ the physical isolation of the school from the familial homes of the residents may have meant that the residents did not have easy access to their families. Even where there were some opportunities to communicate, speaking about any abuse during brief visits may not have been easy. In some institutions there are additional barriers to communication. At the Jericho Hill School for the Deaf in British Columbia, the Deaf community served by the institution was insulated, and residents faced additional social and communication barriers by virtue of language differences with the Hearing community.³¹ In other residential facilities, emotionally troubled children may have required educational resources not available at the institution. The resulting low level of literacy would have contributed to disenfranchisement both while a resident of the school and in later life.³² All of these physical and institutional barriers possibly contribute to the type of privacy and secrecy that fosters abusive relationships.

On a broader systemic level, the concept of abuse in institutions may not have registered on the collective social psyche. First, if abuse happened at a time when child abuse was not widely understood as a social phenomenon, it would have been next to impossible for a child to put their experiences into words. As Mantley states "(i)n 1964, it was out of the question to mention sex abuse, let alone discuss it openly."³³ Further, in an institutional environment, the concept of abuse of authority is less easy to grasp than in an environment where control is not socially sanctioned. Institutional authorities are expected to have control over the residents in their care. Institutions are designed so that the authorities are able, and in fact are required, to impose their wills over the residents. In giving this power to authorities, there is already social acceptance of the exercise of control by authorities over the residents. In an institutional setting, part of the privacy is imposed by the institution itself which controls

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29. E. Goffman, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* (Chicago: Aldine Publishing Co., 1961) at 4.
30. The Nova Scotia School for Boys (presently the Nova Scotia Youth Centre) was located in Shelburne, Nova Scotia which is a small community about 2 to 2 1/2 hours drive from Halifax. On page 4 of his report, Justice Stratton notes that the isolated nature of the school made it difficult for parents to visit their sons: Nova Scotia, *Report of an Independent Investigation in Respect of Incidents and Allegations of Sexual and other Physical Abuse at Five Nova Scotia Residential Institutions* by the Hon. Stuart Stratton, Q.C. (Halifax: Nova Scotia Department of Justice, 1995) at 4.
31. British Columbia, *The Jericho Individual Compensation Program (JICP): A unique response to institutional sexual abuse* by J. Morley (Victoria: Attorney General and Minister for Treaty Negotiations, 2001) at 7. In her report, Morley describes the challenges faced by Program administrators in ensuring awareness and access to the Program by members of the Deaf community.
32. Complainants in the Stratton Report made various comments on their lack of education. For example "Y.T.C. 7 said that the only education she received was at the Centre and she 'did not learn anything there'. She added that today she finds it 'very difficult to read and write because of this'": *supra* note 30 at 85.
33. *Supra* note 14 at 74.

the rules of conduct, communication, and fulfilment of the physical needs of the residents.³⁴ For someone to overcome abuse, they must break the privacy and reach out to speak of their experiences.

(e) Summary of Injuries

From this analysis, the following core injuries result from abuse:

- Sexual abuse can cause fragmentation of the abused person's sense of physical integrity.
- Violent physical acts, sexual or otherwise, can affect a person's sense of identity and his understanding of his relationship to his body.
- There can be an intrusion into the physical, sensory memories of the abused person. This may affect his subjective perception of the world around them.
- There may be a sense of betrayal and a corresponding loss of a sense of ease and safety in the world.
- For children abused during their formative years, there may be an inability to feel joy as a separate person. The child may not learn to identify his own experience of joy and love. Abusiveness supplants an understanding of love.
- A child may not have the capacity to know or register what has happened. She may find it hard to be responsible for her mental pictures of herself and the world around her.
- Especially in an institutional setting, the imposition of control, secrecy and privacy to maintain the abusive relationship may diminish the ability of the abused person to speak out about the abuse.

In order for a person to speak about abusive experiences, and eventually seek a remedy, she must overcome certain of these effects, at least to some degree. For example, she must become aware that she is not responsible for the abuse, she must break the isolation and speak to another person about the abuse, she must overcome the control that the abuser has over her so that she can seek a remedy, and she must be able to recognize her injuries.³⁵ After accomplishing these feats, she may come to a point where she is granted a monetary award, either directly by the institutional authorities, or by a court. In this article, my focus is not upon the process for overcoming abuse and seeking a remedy. I am focusing on the difficulties associated with monetary awards in the face of these highly personal forms of injury.³⁶

34. *Supra* note 29 at 1-12.

35. The barriers that challenge adult survivors of child sexual abuse were recognized by the Supreme Court of Canada in *M. (K.) v. M. (H.)*, [1992] 3 S. C. R. 6, where the Court considered the discoverability principle in discussing the application of limitation periods.

36. In this article I look both at the situation where the institutional authorities were well aware of the abusive acts and sanctioned them, as was the case in *Muir*. I also look at the case where compensation was provided to former residents even though the institutional employees acted outside the scope of their duties and against institutional policies. I use both situations for the purpose of

C. JUDICIAL TREATMENT OF COMPENSATION

Ms. Muir's experience with the Eugenics Board of Alberta provides an example of the fragmentation of identity that can occur as a result of institutional abuse.

In *Muir v. Alberta*, the plaintiff became a resident of the Provincial Training School for Mental Defectives. Ms. Muir was placed in the institution, notwithstanding evidence that she had behavioural problems and was not "defective" as her mother had the institutional authorities believe.³⁷ Despite the fact that some officials doubted whether or not Muir had a mental deficiency, she was labeled as a mental defective and a 'moron'. She became identified as a 'moron' and as recognized by the trial judge in her lawsuit against the province of Alberta, this had a severe lifelong impact on her sense of self and her abilities. Muir herself believed that she was deficient and suffered psychological damage because of this particular form of objectification. In fact, Ms. Muir is exemplar of how we all incorporate external and socially constructed concepts of identity into our ideas of selfhood. If Muir had been in an environment where her mental abilities or lack thereof were not the prime focus of her social identity, then perhaps she would have had a broader, more forgiving and positive vision of herself. However, not only did labeling have a severe impact on her self-image but the Eugenics Board focused and relied on this characterization of Ms. Muir, and sexually sterilized her against her knowledge and without her consent.³⁸ Her identity as a 'moron' not only objectified her as being primarily defined by her mental acuity, but it also identified her to those in authority as a less worthy person who must be stopped from procreating.

There is some evidence to support the proposition that the eugenics movement was influenced by the desire of certain policy makers to maintain the purity of the dominant racial group in Alberta and British Columbia. So not only was Muir's personal identity affected by the labels of the Eugenics Board, so too was the identity of the group to which she belonged. An expert witness in the case, Professor Robertson, testified that eugenics practices in the early twentieth century were geared toward establishing racial purity and breeding out mental defectives. The prevalent beliefs among the middle class contributed to the popularity of eugenics.³⁹ There was a belief that feeble-mindedness was a menace to society and contributed to crime, prostitution,

examining compensation. At this time I am not looking at the issue of accountability, the appropriateness of an apology or other issues related to liability.

37. *Supra* note 8 at 705. Shortly after being admitted a psychiatrist examined Muir and found that she had behavioural problems and there was doubt about whether or not she had a primal mental deficiency. Muir had a very difficult relationship with her mother who showed little interest in taking care of her child. There is evidence to the effect that Muir's mother appears to have told the authorities that Muir was older than she really was. Thus her psychometric tests would indicate that she was mentally deficient and she would be admitted to the school. There is also evidence that Muir had been neglected at home. At one point, Muir was considered abandoned by her family as they moved out of province without notifying her.
38. Under the *Sexual Sterilization Act* S. A. 1928, c. 37 as am. by S. A. 1937, c. 47 no consent was required for the sterilization of mental defectives: see T. Caulfield & G. Robertson, "Eugenics Policies in Alberta: from the Systematic to the Systemic?" (1996) 35 *Alta. L. Rev.* 59.
39. A. McLaren, *Our Own Master Race: Eugenics in Canada, 1885-1945* (Toronto: McLelland and Stewart, 1990) at 37.

drunkenness and other social problems.⁴⁰ At the same time, racist beliefs were rampant and there was a high degree of suspicion of immigrants from Southern Europe, Eastern Europe and the Orient.⁴¹ Claims were made that foreigners were responsible for the (perceived) high degree of crime. Fear of non-British, non-White, and non-Protestant immigration led such stellar political characters as Emily Murphy, Nellie McClung and J.S. Woodsworth (who later recanted these beliefs) to advocate eugenics practices.⁴² In addition to the popular social climate in the early part of the century, scientists were disseminating theories linking feeble-mindedness to crime.⁴³ Belief in scientific method and the advent of modernity bolstered questionable theorems about large groups of people. Articles were written by doctors such as Dr. Morris Siegel in 1934 who claimed that “the female morons grow up to be irresponsible women, falling deeply into the abyss of prostitution, alcoholism and addiction to narcotic drugs”.⁴⁴ The authority of these statements from prominent medical practitioners and scientists fueled middle-class fears and justified the treating certain groups of people as less than worthy of the same privileges as the dominant group.

At the height of the eugenics movement in Alberta, the *Sexual Sterilization Act* was passed. The *Act* established a board which was empowered to authorize the sexual sterilization of individuals about to be discharged from a mental hospital to prevent the procreation of people with disabilities. After amendments in 1937, the powers of the board were expanded to allow the sterilization of people with neurosyphilis, epilepsy with psychosis or mental deterioration, and Huntington’s Chorea. Consent was only required for psychotic persons and was not required for the sterilization of so-called ‘mental defectives’. During the forty-four years of its operation, the Eugenics Board sterilized 2,822 people.⁴⁵ Studies show that the *Act* was administered in such a way that it had disproportionate impact on females, the unemployed, people of minority ethnic backgrounds and the poor.⁴⁶

A third way that the Eugenics Board affected Ms. Muir’s sense of self was the impact that its decisions had upon her physical integrity. The act of sterilization was an insidious form of assault that undermined her sense of physical being. Her body, was invaded and altered and her ability to reproduce was curtailed. One could say that her body was the last frontier that fell under the onslaught of the Eugenics Board. Although we know that there are varying degrees of control that we have over our social identity and labels that are attached to us throughout life, we at least think that we have control over the imposition of acts against our bodies. Our laws give us protection against non-consensual touching and medical procedures precisely because as a society, we

40. T. Caulfield, *supra* note 38 at 69.

41. *Ibid.* at 69.

42. *Ibid.* at 61.

43. *Ibid.* at 67-68.

44. *Ibid.* at 67.

45. *Supra* note 8 at 745.

46. T. Caulfield, *supra* note 38 at 61.

consider physical integrity to be of prime importance. And yet, the *Sexual Sterilization Act*⁴⁷ allowed for a breach of physical integrity that goes to a core aspect of our physicality – the ability to reproduce. The sterilization imposed a severe physical limitation upon a core aspect of Muir’s physical being. In the act of irreversibly affecting her body without the concurrence of her will, the Eugenics Board created distance between Ms. Muir’s sense of self and her reproductive capacity. In this way, Muir’s sexual capacity, something taken for granted by many, was separated from her, both physically and psychologically.

After years of searching for answers about the procedures that were performed upon her, Ms. Muir brought her case before the courts. After determining liability, the judge was faced with the daunting task of addressing Ms. Muir’s loss of reproductive capacity and the injuries that she suffered. Ms. Muir’s loss was not easily equated to dollar values. She did not lose a car or even wages, to a significant degree. If she had, these items would have been relatively easy to evaluate for the purpose of determining damages as we exchange them for money with ease and regularity. Her losses were extremely personal and had to do with the loss of her physical integrity at the hands of abusive institutional authorities. These injuries to identity, selfhood or integrity are not easily evaluated as we consider these things as existing integrally to ourselves. We cannot separate who we are for the purpose of assigning a symbolic monetary value to part of ourselves. I would propose that money need not be restricted to symbolizing an exchange, substitution or compensation *for* some aspect of our selfhood that has been injured. Rather, in these cases, money can be a form of acknowledgment of the harm. An amount provided to recognize pain does not interfere with the injury. It leaves the pain and recovery in control of the survivor and indicates respect for it.

The judge in *Muir* acknowledges Ms. Muir’s very personal losses. He states “(m)oney will not allow Ms. Muir to conceive; it can only provide succour for the pain that she has suffered during these past decades.”⁴⁸ In his acknowledgment, he hopes Ms. Muir will derive some succour or comfort.

D. NON-JUDICIAL COMPENSATION PROGRAMS

In the 1990s many governments and institutions across Canada saw the emergence of institutional abuse claims as a prime opportunity to implement formalized alternative dispute resolution mechanisms. Lengthy civil proceedings have severe cost implications cost for both parties; the claimant often bears a greater relative burden because of a lack of initial resources for the payment for legal fees. Governments could use non-judicial processes to reduce the transaction costs, such as time and expense, that all parties would incur to their mutual detriment through the civil litigation process. Governments could also reduce the stresses of litigation on claimants by implementing a mechanism that would not force claimants to face their abusers. Ideally, an alternative process would mean that an abused person who had already experienced psycho-

47. *Sexual Sterilization Act*, *supra* note 38.

48. *Supra* note 8 at 193.

logical trauma would not be re-victimized by the process. Further, dispute resolution mechanisms could provide a process that is geared toward healing the victim as opposed to simply determining causal damage and recognizing loss through monetary awards. Alternative mechanisms could allow for a greater range of solutions than is available through formal legal proceedings. It would be possible for the parties to negotiate for monetary compensation, apologies, psychological therapy and other treatments, an opportunity to establish a record of the stories told by victims, public education about abuse, support for families of victims, career counseling, and interim awards to assist claimants.⁴⁹ Thus, a negotiated solution could be more easily tailored to suit the needs of the parties involved in the negotiation and the process itself could deal with the specific relationship between the parties.

The Nova Scotia Compensation Program provided non-monetary remedies that were not available through a judicial process. There were provisions for an apology letter from the Minister of Justice, interim and long-term counseling, a list of government services available to the claimants, an independent recorder of a public report of survivor's testimonials, and the payment of legal fees and disbursements.⁵⁰ The most significant and contested remedy, however, was the monetary compensation paid out to claimants.

Various mechanisms have been used across the country to provide monetary awards for people who had been abused while residents of provincial and Federal institutions. The government of New Brunswick provided compensation up to \$120,000 for sexual abuse suffered at the New Brunswick Training School at Kingsclear.⁵¹ Compensation was paid for pain and suffering, educational benefits, loss of past earnings and the loss of future opportunity.⁵² In Ontario, among other benefits, the Helpline Reconciliation Agreement provided compensation up to \$25,000 for pain and suffering for former residents of St. John's Training School and St. Joseph's Training School who had been abused while at the schools.⁵³ Compensation was provided to eligible persons who suffered acts that met the definition of injury in the *Compensation for Victims of Crime Act*.⁵⁴ In the Grandview Agreement, monetary compensation was provided for both physical and sexual abuse depending upon the category of the abusive act.⁵⁵ The maximum amount that could be received was \$60,000 for acts falling within the most serious category plus individual and group benefits for counseling, educational upgrading, tattoo removal and other needs. It was specified in the Grandview Agreement that the compensation was for pain and suffering.

49. *Supra* note 2 at 30.

50. See clauses 28-63 and 66 of the Memorandum of Understanding: *infra* note 56.

51. *Infra* note 55 at 142.

52. *Ibid.*

53. *Ibid.* at 137.

54. *Compensation for Victims of Crime Act*, R.S.O. 1990, c. C. 24, s. 1. This section defines injury as "actual bodily harm".

55. Law Commission of Canada, *Institutional Child Abuse in Canada* (Background Paper) by R. Bessner (Ottawa: Law Commission of Canada, 2000) at 130-31.

The Nova Scotia Compensation Program set out a grid or scalar format similar to the one used in the Grandview Agreement. However the maximum award in Nova Scotia was higher and the grid had more categories.⁵⁶ In the Nova Scotia Program, there were twelve categories ranging from the most serious “Severe Sexual Abuse and Severe Physical Abuse” category to the least serious “Minor Physical and/or Sexual Interference”.⁵⁷ If a claimant alleged acts that fell within the most serious category, he could receive \$120,000 plus a \$10,000 counseling allotment. Guidelines were provided to assist Compensation Program assessors with categorizing the claims of abuse. For example, the category “severe sexual abuse” includes anal intercourse, vaginal intercourse and oral intercourse that was repeated and persistent such that it could be characterized as chronic. Severe physical abuse was abuse that resulted in broken bones or other physical trauma with evidence of hospitalization or permanent disability. The assessor also had to consider aggravating factors such as verbal abuse or racial acts when determining the appropriate level of compensation.⁵⁸

Whereas the Kingsclear model and the Helpline Reconciliation Agreement articulated that the compensation was for pain and suffering, the Nova Scotia Memorandum of Understanding did not specify that the compensation was meant to address personal or psychological injuries or pain. Rather, the assessors were guided to focus on the acts instead of the effects of abuse. A claim of chronic anal intercourse ranked higher on the compensation chart than a claim of repeated instances of oral intercourse, no matter what the subjective effect was for the particular victim. The government assessors evaluated the worth of the objective act and did not explicitly recognize the personal effect of the act.

The problem with awards that are not accompanied by recognition of the personal effects of abuse has been articulated by abuse survivors themselves. In a survey done of various survivors of institutional abuse in Canada, the following was stated:

While most women appreciated the financial award and felt that it was very important, others said that it felt like ‘blood money’. Several women added that there was no amount of money that could make up for what they experienced at Grandview.⁵⁹

Interestingly, the survivor was commenting on the Grandview Agreement which did specify that compensation was for pain and suffering. Even with an express articulation, the meaning of compensation is contested. At one level it is appreciated, at another it is resented because it is perceived as an attempt to “make up” for the effects of abuse, which cannot be neutralized with money. It is seen as an attempt to exchange

56. The Memorandum of Understanding Regarding Compensation for Survivors of Institutional Abuse” [“MOU”] is reproduced in Nova Scotia, *Searching for justice: An independent review of Nova Scotia’s response to reports of institutional abuse* by F. Kaufman (Halifax: Province of Nova Scotia, 2002) at Appendix F. Schedule B of this document contains the grid used by assessors.

57. *Ibid.*

58. *Ibid.* at Schedule C.

59. *Supra* note 2 at Appendix 1, at 19.

experience for money. This ambivalent relationship with money appears in another survey done by the same authors:

Several respondents expressed the view that financial compensation should have been tied to claimants' participation in education and upgrading, job skills and life skills training 'so they could improve their lives'. Others were adamant that survivors of institutional abuse deserve direct financial compensation for the abuse, harm and suffering they endured.⁶⁰

There is some evidence that the survivors' understanding of monetary awards is partially derived from the process used to determine the amount to be awarded to various members of the group of abuse claimants. Again, in reference to the survey of survivors:

many objected to the use of categories to define and rate their childhood abuse experiences. . . . 'its like they were labeling beef'⁶¹

These examples indicate that attention should be given to the statement accompanying the award, as well as the process used to determine the amount.

E. THE DIFFICULTY WITH MONETARY AWARDS

The Law Commission of Canada recommended that "the processes of redress should not cause further harm to survivors of institutional abuse, their families or their communities".⁶² As outlined in an earlier section, one of the specific effects of abuse is the separation or disassociation that occurs internally within an abuse survivor. As described by therapists and survivors themselves, abuse forces upon the survivor a sense that his body, or specific parts of his body, are separate and distinct from his sense of who he is, and that his body is for the use of another. In contradistinction to someone who has not suffered from a violation to her body, the abuse survivor may understand his body as an object for the use of another. When providing a remedy for these people, the use of a grid to determine the amount of the monetary award can contribute to a sense that physical integrity is once again at stake. It may appear that the act of abuse, and the liability that flows from it, are being bought by the institution.

The issue for those seeking to respond to abuse claims, is how to recognize and compensate for injuries suffered, without perpetuating a sense of disintegration or disassociation within the abuse survivor. As I will discuss below, monetary awards may carry contested meanings that can tend to lead to the conclusion that the abuse survivor, and particular acts inflicted upon her body, are being treated as objects for compensation purposes.

60. *Ibid.* at Appendix 1, at 12.

61. *Ibid.*

62. *Supra* note 5 at 402.

1. The Predominant Meaning of Monetary Awards in Dispute Resolution Processes

In the absence of any alternative definition, compensation itself will tend to be conceptualized in economic terms and within a market paradigm. This will happen for two reasons. First, the main tool for awarding compensation is money. Money is the prime tool used to exchange goods on the marketplace and signifies that goods are fungible and that their value is transferable. *Prima facie*, money indicates the existence of a marketplace and objects that are commodities for trade. Where money is used as a remedy, it is easy to conceptualize an injury as something that can be somehow traded for money. The second reason is that resolution in both the civil litigation system and a non-judicial compensation program can be reached by way of a negotiated agreement. Negotiation presumes that the parties have a relatively equal ability to assert their interests and make economic choices. Also, negotiation is a private mechanism of dispute resolution that relies on the parties to explicitly consider and develop non-economic meaning for monetary awards. Consequently, if the parties do not raise non-economic values, there is always the danger that a default market-based meaning will infiltrate monetary awards. This is not so problematic in the courtroom where there is at least a designated space in the decision-writing exercise for the consideration of different categories of damages. Non-pecuniary damages refer specifically to those injuries that cannot be priced. Punitive damages in litigation proceedings are specifically intended to punish the defendant. In a negotiated settlement, there is no tradition or expectation that condemnation of serious wrongs, punishment for harm perpetrated upon victims, and recognition of the nature of harm, will be connected to monetary awards. It is left to the parties to raise and recognize values in the negotiation process that are not capable of being priced.

However, it can be difficult for the parties to recognize the personal nature of the harm in the first place, let alone find a way to acknowledge it in a negotiation where money is often the prime universalizing negotiating tool. In attempting to reach a workable agreement for both sides, the subtleties of how monetary awards for abuse should be conceptualized can be lost among the more prominent targets of achieving agreement over the amount of money that is to be awarded. And so, even with these tailored and negotiated processes, parties and the public are in danger of neglecting to provide a meaning to awards that corresponds to their needs and the purpose of their agreement. In fact, without the explicit recognition of the personal nature of the harm, survivors of abuse can feel that they have simply been paid off and that somehow yet again, the other party and society have missed the point of their loss.⁶³

2. Alternative Ways to Understand Monetary Compensation

Margaret Radin in her analysis of the hegemonic properties of market-based economic discourse, asserts that a rhetoric that commodifies personal attributes has a culture-

63. R. Abel asserts that compensation has the effect of commodifying love. Also, instead of evoking compassion for victims, it has the result of evoking envy: see R. Abel, "Torts" in D. Kairys, ed., *The Politics of Law: A Progressive Critique* (New York: Basic Books Inc. 1998) at 456.

shaping function. Radin argues that law and economics discourse is a powerful rhetorical force which has the ability to shape culture and our understanding of the world. As she states:

When we live in a world in which many or most things people need and want are routinely traded as commodities, and when we see dollars systematically being paid to people after they are injured, and in some way “for” or “on account of” the injury, we are likely to come to conceive of freedom from injury as another commodity bearing exchange value, even if we do not now conceive of it that way.⁶⁴

To illustrate, Radin considers a topic frequently debated among law and economic theorists: does simply speaking of babies in terms of market rhetoric have a real effect on culture despite the fact that baby-selling is not a widely sanctioned practice in our culture? She argues that a widespread conceptual scheme that has effectively infiltrated our discourse will in fact shape the nature of our relationships with our children. So, although we may feel that children have an intrinsic value that is incommensurable with dollars, a market-based conceptual scheme that hypothetically allows for trade of children for dollars will infiltrate our understanding such that it is possible to conceive of children as commodities for various purposes. If we apply Radin’s theory of the culture-shaping function of law and economics rhetoric to the situation of compensation for institutional abuse cases, we can perhaps understand why abuse claimants may have felt that the money they received was “blood money”.⁶⁵ If we speak as if the effects of abuse can be exchanged for money, then it becomes more of a reality, despite intentions to the contrary.

Radin’s analysis focuses on the limitations of an economic analysis that uses dollar value as its base, and that reduces all human choices to market choices between commodities.⁶⁶ The traditional law and economics approach to compensation does not easily lend itself to a compassionate view of the law that recognizes the personal nature of harm.⁶⁷ Economics, as we have come to understand it, is associated with classical liberal theory, extreme individualism, and wealth maximization. This particular understanding of economics requires a high degree of objectification so that wealth maximizing choices can be made between comparable, or commensurable objects.⁶⁸ In seeing the law through this particular economic lens, one is tempted as Judge Posner has been, to discuss all characteristics of humanness as if they are commensurable and fungible.⁶⁹

64. M. Radin, *Contested Commodities* (Cambridge: Harvard University Press, 1996) at 203.

65. *Supra* note 2 at 19.

66. *Supra* note 64 at 2-4.

67. *Ibid.* at 184.

68. *Ibid.* at 8.

69. *Ibid.* at 2-15.

3. Dilemma of Liberal Economic Theory

Ironically, though the liberal conception of the person envisages the attainment of maximum autonomy and expression of self, the opposite can occur. The self is expressed through the physical being and the physical world. If the physical being and the physical world is completely alienable, and if all alienable things are defined and valued in monetary terms, then self-expression is ultimately limited to the language of money and markets. Thus, radical alienation has a limiting effect on self-expression.

Without specific clarification of the meaning of compensation for abuse survivors, a process that uses the tools of the market and a structure that indicates commodification of personal injury will absorb the analysis of a reductionist classical economic theory. Classical economic theory requires a radical degree of objectification. When this objectification is applied to the realm of our identity, then the resulting alienation creates a dilemma for liberal theorists. Although the conception of personhood in liberal theory envisions a high degree of autonomy and personal power, in objectifying all aspects of human personality, liberal economic theory in fact destroys the physical integrity of identity that is required for the manifestation of empowerment.

This analysis of the liberal dilemma presupposes a conception of personhood where identity is fundamental to well-being and alienation of fundamental aspects of identity through commodification is inimical to well-being. For instance, in this view, placing a woman's reproductive capacity in the marketplace strips her of an important aspect of her identity as a woman; it does not represent her ultimate expression of will.

(a) *Avoiding the Dilemma*

But perhaps it is not necessary to entirely reject economic analysis if it proves flexible enough to embrace a more holistic, subject-oriented focus. Economics is not necessarily only about wealth maximization. It can be more generally about well-being, sustainability and needs fulfillment.⁷⁰ If an economic model is expanded so that it recognizes these values that relate directly to human personality as opposed to the indirect and abstract value of wealth-maximization, then the nature of the economic inquiry changes fundamentally. It becomes more focused on the personal experiences of economic agents and less upon the choices that they should, theoretically be able to make. It re-orientes the focus of economic activity such that the person's role is not only to decide between an artificial array of economic choices; the economic actor also has a contextual content that is affected by and affects economic decision-making. The liberal model, on the other hand, depends heavily on an abstract and highly stylized concept of human personhood.

An economic focus on needs and well-being provides the opportunity to incorporate the realities of persons instead of relying upon theoretical abstractions. An economic model that relies upon well-being and well-fare of groups and individuals can more

70. M. Morris, *Measuring the Condition of the World's Poor: The Physical Quality of Life Index* (New York: Pergamon Press, 1979) at 94. In this book the author explores the possibility of moving away from measuring growth and production and moving toward measuring social welfare and needs-fulfillment in macro-economic analysis.

easily recognize values that are denied by Posnerians and raised as problematic by Radin. Amartya Sen succinctly points out the limits of a narrow economic theory in the following way:

It is not my purpose to argue that simplification can never be justified. Economics – indeed any empirical discipline – would be impossible if simplifications were to be ruled out. The point concerns the need to recognize distinctions which are important for the purpose of the study at hand. What is objectionable in the economic theorizing that identifies widely different concepts of self-interest, motivations, etc., is not the fact of simplification itself, but the particular simplification chosen, which has the effect of taking a very narrow view of human beings (and their feelings, ideas and actions), thereby significantly impoverishing the scope and reach of economic theory.⁷¹

And so, it is not necessarily that an economic analysis of the law of compensation is inadequate but rather that an economic analysis based solely on market maximization and capital growth will lead to a conceptualization of human personality and choice which is overly narrow. Instead, economic analysis can perhaps recognize incommensurable values as having value, although not capable of being traded on the market.

4. The Meaning of Compensation in Torts

Radin recognizes that we have some difficulty reconciling the incommensurability of market rhetoric that is sometimes associated with compensation, and the personal pain and suffering of a plaintiff. She explores how market rhetoric impacts on our culture and understanding of identity and she proposes that there are some aspects of tort injuries that we consider incommensurable with commodification. Some injuries are closer to our sense of self and thus are less easily placed on par with commodities on the market place. Other aspects of ourselves may be more easily objectified, or put at a distance from our selves, and are consequently easier to alienate and place in the marketplace for exchange. As Radin notes, compensation for personal injury is one area where the contested meanings of market commodification can most easily be examined.⁷² Specifically in personal injury cases, the use of dollars to remedy both pecuniary and non-pecuniary losses can create confusion around the meaning of compensation.

In a pure deterrence model of commodified compensation,⁷³ an economically rational tortfeasor would implement safety features if these safety features cost less than paying damages for accidents. For example in *Muir*, the government would evaluate the damages that might be payable to Ms. Muir and then decide whether or not to sterilize her. The *Muir* case demonstrates many problems with the pure deterrence model. First, perfect knowledge of the potential costs of their action is required for the government to make an accurate judgement of whether or not to sterilize Muir. Second, the tortfeasor must

71. A.Sen, *Commodities and Capabilities – Lectures in Economics: Theory, Institutions, Policy* (Elsevier Science Publishers B.V.: Amsterdam, 1985) at 4.

72. *Supra* note 64 at 184.

73. *Ibid.* at 186.

understand that his acts are actually inflicting an injury upon someone. At the time that the government enacted the *Sexual Sterilization Act*, there was no understanding that the administration of the *Act* would result in injury to Ms. Muir and others who fell within its jurisdiction.

Radin points out that many who are sympathetic to economic reasoning do not adopt a pure version of the deterrence model. Rather, although economic efficiency is a goal, rights associated with bodily integrity are also recognized. This mixed view also engages a commodified conception of compensation as the payment of damages is in exchange for the rights that were violated. Ideally compensation makes the victim whole again. Thus, injury and the payment of damages are treated exactly as if the victim sold a commodity that she owns.⁷⁴ In the *Muir* case, for example, this view would hold that the plaintiff had accepted damages in exchange for the loss of her reproductive capacity. In this conception of compensation she is deemed to have owned her capacity to have children and because it was taken away from her, she is entitled to receive money in exchange for it. In order to compensate her, the court would have had to assessed the worth of her loss by evaluating the value of her right to reproduce and then ordered the government to pay for taking it away from her. As Radin states, in this view the damage award makes the victim whole again as she is indifferent with respect to being harmed and getting the payment of damages.⁷⁵ This conception of compensation is mixed because it allows for the existence of non-market values, but it allows these values to be traded for money.

In the *Muir* case, someone who is sympathetic to this kind of analysis might try to argue that the Alberta government paid a sum of money for Ms. Muir's reproductive capacity. However, this is not the case, because the judge clearly delineated his intention to order compensation on the basis of her own sense of loss. In the decision, he stipulates that the award is made in order to provide succour for her pain; it is not direct compensation for her stolen capacity to reproduce. The judge in *Muir* clearly states that "(m)oney will not allow Ms. Muir to conceive; it can only provide succour for the pain that she has suffered during these past decades."⁷⁶ Because of his articulation of the meaning of compensation, there is less opportunity for the monetary award to be understood as an exchange for her right to reproduce. Succour is a response to Ms. Muir's emotional needs and pain; this is something that the judge recognizes, in accordance with our society's understanding of this type of pain, as being incommensurable with a market economic analysis. In this instance, money symbolizes recognition of pain; it does not signify an exchange of goods.

Radin categorizes this understanding of compensation as a non-commodified conception of compensation that attempts to provide solace to the plaintiff. She argues that within the judicial system we have a non-commodified understanding of compensation that allows for the centrality of other values beside dollars and markets.⁷⁷ For example, principles of

74. *Ibid.* at 187.

75. *Ibid.* at 186-87.

76. *Supra* note 8 at 193.

77. *Supra* note 64 at 189.

corrective justice seek to restore the moral balance between the parties. Thus, right and wrong, concepts that are incommensurable with market values, are used for determining compensation in the form of punitive damages.⁷⁸ Radin argues that compensation for injury should be viewed as redress of the harm done to the victim and as recognition of the fault of the defendant. Money, should be a symbolic, but not empty gesture of recognition. As she states, “redress means showing the victim that her rights are taken seriously. It is accomplished by affirming that some action is required to symbolize public respect for the existence of certain rights.”⁷⁹

These examples of Radin’s taxonomy of compensation reveal that our understanding of compensation is informed by various conceptual paradigms. She also asserts that in some instances, the values that are recognized by the courts are incommensurable with an economic rhetoric that assumes the fungibility of all aspects of personhood. Compensation can mean many things. Alongside our economic conceptualization are bubbles of incommensurable values which must be acknowledged through compensation, but not reduced to commodities that are alienable from the person. In describing both the commodified and non-commodified versions of compensation, Radin is exposing our conflicting ideas of the meaning of compensation. Some prefer a simple, overarching economic conceptualization. Others see that there is complexity associated with different types of harms, complexity which cannot be addressed by one single conceptualization based on economic theory.

I would suggest that Radin’s conception of compensation as acknowledgment is not truly compensation at all. Acknowledgment is different in kind than compensation. The word ‘compensation’ implies an exchange or provision of money in lieu of or to substitute for something. Acknowledgment, respect and recognition do not touch the injury in the same way that compensation does. In that respect, monetary awards that are in recognition of pain and injury, are not properly called compensation. Because of the inherent flexibility in a non-judicial program, it is possible to create a category of monetary award that specifies that an award is not meant to interfere with the injury. This may go some way toward allowing a survivor of abuse to see the award as respecting her physical integrity.

5. Overcoming the Problem of Compensation for Institutional Abuse Cases

I have argued that in the absence of an articulation of meaning, there is a significant danger that monetary awards will be understood as part of a market transaction that ignores the very personal injuries that arise from abuse. If the intention of compensation is indeed to simply pay off the abuse claimants, then perhaps the lack of articulation is appropriate. However abuse can result in a sense of disintegration or physical alienation within the abuse survivor. It is worthwhile to attempt to address

78. This point is raised by R. Abel who states that “tort law has turned to the language of economics, replacing moral fault with the efficient allocation of resources, a concept that appears scientific and apolitical.” Abel points out that although cloaked in the guise of neutrality, economic discourse itself has an inherent normative point of reference – namely efficiency: *supra* note 63 at 451.

79. *Supra* note 64 at 188.

this particular injury, or at least make significant efforts to avoid perpetuating a sense of alienation when providing monetary compensation. If the intention of an award is to address harms to psychological identity and physical integrity and provide a form of closure or satisfaction to abuse survivors, then I have argued that there must be an explicit statement of this intention when money is awarded.

In the absence of an articulation of meaning to accompany an award, there is the danger that a market-based economic understanding of the meaning of monetary awards will prevail. The parties and designers of a non-judicial response should recognize their own capacity to conceptualize monetary awards in a variety of ways. In order to deal with the problem of monetary awards being viewed by abuse survivors as insults to integrity, monetary awards should be understood as being a form of recognition for injury to identity and as solace for pain. Further, the process for determining the amount should avoid perpetuating a sense of disassociation or disintegration within the abuse survivor.

It may be that the difficulty in avoiding this characterization of monetary awards will not be overcome simply by an articulation that financial awards are for pain and suffering, as was done in the Grandview Agreement. Perhaps the meaning attached to monetary awards should contain an explicit articulation that at least some part of the award is intended as recognition of damages to the self, and to physical integrity. Further, various aspects of the redress program and process should be congruent, and acknowledge that core aspects of personhood are affected by abuse.⁸⁰ For example, though criteria may be used to establish horizontally equitable awards, a separate flat amount may be awarded for the purpose of acknowledging harms to identity and physical integrity.

Specific ways to avoid perpetuating the alienation experienced by abuse survivors may include the following:

- discussions between survivors and program designers for the purpose of communicating the impact of the abuse upon the survivors;
- consultation with survivors to develop meaningful language to accompany monetary awards use of this language, only with the permission of survivors;
- the development of a method for determining the amounts of compensation to be paid to individuals that includes recognition of non-commensurable values such as fragmentation of identity. For example, based on research, a grid may be developed which recognizes which abuse factors tend to impact upon the severity of the injury such as the duration of the abuse and the relationship of the abuser to the abuse survivor. However in addition, another part of the award should be designated specifically to provide solace and recognition of injuries to identity

80. In this article, I restrict my analysis to the minimum articulation of the meaning of monetary awards that should be provided. Further work lies in the challenge of designing an entire redress process that is equitable and that also avoids perpetuating harm.

and personality. This amount may be a flat amount provided to all abuse survivors.

- the development of terminology that indicates that some portion of the monetary award is not meant as an exchange, or as compensation *for* the injury, but is meant as recognition *of* the injury.

F. CONCLUSION

In this paper I have described the fragmentation of identity, and alienation from the body that results from institutional abuse. These forms of injury are not easily addressed by way of monetary awards. As noted, the courts have a language, and a conceptual framework to acknowledge highly personal forms of injury that cannot be directly equated with a monetary value. Non-judicial programs designed to respond to claims of abuse, however, do not necessarily have the conceptual framework to protect non-market values that may be the actual focus of compensation.

It is in the interest of institutional authorities to provide a response to claims of abuse that provides satisfaction to claimants, so that the resolution is enduring and provides finality for all parties. Given the personal nature of the harm inflicted upon institutional abuse survivor, it is worthwhile for the parties, or the designers of a government program to ensure that they articulate some meaning to attach to monetary awards. The statement accompanying awards should contain recognition and acknowledgment of the personal nature of the harm that results from institutional abuse. The method of determining the amount of the award and the purpose attached to it should avoid perpetuating a sense of fragmentation that resulted from the initial abusive experience.

