Righting Past Wrongs Through Contextualization: Assessing Claims of Aboriginal Survivors of Historical and Institutional Abuses

Elizabeth Adjin-Tettey

2007

RIGHTING PAST WRONGS THROUGH CONTEXTUALIZATION: ASSESSING CLAIMS OF ABORIGINAL SURVIVORS OF HISTORICAL AND INSTITUTIONAL ABUSES

Elizabeth Adjin-Tettey*

The Agreement in Principle [AIP] *towards a Fair and Lasting Solution of the Legacy of Indian Residential Schools (2005) provides a non-judicial settlement process for Indian Residential School (IRS) abuse victims. The* AIP *is commendable and many survivors will likely seek compensation through that process. However, the* AIP *does not eliminate the possibility of some IRS survivors pursuing tort claims. Also, the* AIP *does not cover Aboriginal survivors of historical abuses outside the IRS system. This paper emphasizes the need for a flexible and contextualized approach to tort claims by Aboriginal survivors of institutional and historical abuses. Application of seemingly neutral principles de-contextualizes the claims, limits the scope of inquiry, and ultimately results in depressed damage awards for claimants. A link is established between the legacies of colonization, racism and assimilation policies, claimants' victimization and the current socio-economic marginalization of Aboriginal people to justify the need for contextual approaches in responding to these claims. The paper argues that the ways in which defendants and courts use the limitation defence, establish the scope of inquiry, and construct plaintiffs' 'original position' in determining the consequences of actionable wrongs are problematic. Consequently, construction of these factors could potentially exclude court-based processes as a realistic redress option for many survivors. The paper argues that claims must be assessed against the backdrop of therapeutic jurisprudence as a way of enhancing tangible and intangible benefits for claimants. To be a meaningful option, the tort system must be flexible and contextual, giving due consideration to the historical factors and processes that have produced many of these claims. Law, in particular, the redress process, should play a meaningful role in the decolonization of Aboriginal people.*

L'Accord de Principe *en vue d'une solution juste et durable au legs des pensionnats indiens (2005) prévoit un processus de règlement non-juridique pour les victimes d'abus dans les pensionnats indiens. L'Accord est louable et il est probable que beaucoup de survivants chercheront à obtenir des réparations selon ce processus. Toutefois, l'Accord n'élimine pas la possibilité que certains des survivants des pensionnats indiens*

* Associate Professor, Faculty of Law, University of Victoria.

intentent des actions délictuelles. De plus, l'Accord ne couvre pas les survivants autochtones d'abus historiques en dehors du système de pensionnats indiens. Cet article souligne le besoin d'une approche souple qui tient compte du contexte pour traiter des réclamations pour délit de survivants autochtones d'abus institutionnels et historiques. L'application de principes qui peuvent sembler neutres fait abstraction du contexte des réclamations, limite le cadre d'enquête et, en fin de compte, fait que des dommages-intérêts réduits sont accordés aux réclamants. On établit un lien entre les legs de la colonisation, des politiques racistes et assimilatrices ainsi que de la victimisation des réclamants et la marginalisation socio-économique actuelle des peuples autochtones pour justifier le besoin d'approches qui tiennent compte du contexte pour traiter de ces réclamations. L'auteure soutient que les façons dont les défendeurs et les cours utilisent la défense du délai de prescription, établissent les cadres d'enquête et composent la «situation initiale» du demandeur pour déterminer les conséquences de torts ouvrant droit à une poursuite sont problématiques. En conséquence, pour beaucoup de survivants, cela peut exclure l'utilisation des tribunaux comme option réaliste pour obtenir des réparations. L'auteure soutient qu'il faut utiliser la jurisprudence thérapeutique comme toile de fond pour évaluer les réclamations afin d'augmenter les bénéfices tangibles et intangibles pour les réclamants. Pour constituer une option valable, le système de traitement de délits doit être souple, tenir compte du contexte et accorder une juste considération aux facteurs historiques et aux processus qui ont mené à beaucoup de ces réclamations. Le droit, et en particulier le processus de réparation, devrait jouer un rôle constructif dans la décolonisation des peuples autochtones.

I. INTRODUCTION

This paper focuses on responses to claims by Aboriginal victims of abuse while in government care. Many of these claims stem from alleged abuses that occurred many years ago. To what extent do courts consider the broader issues of colonization and racism that have informed the relationship between Aboriginal people and the settler society, and that have given rise to many of these claims? Most of the abuses occurred in Indian Residential Schools (IRS) and other state-run institutions.[1] Aboriginal children were also abused in other

1 Indian residential schools were first established in Canada by religious organizations as part of their missionary work. The federal government was involved in the development and operation of residential schools since about 1874, mostly in response to its legal obligation towards Indians under the *Indian Act* and also as part of its assimilation policy. The federal government operated the schools jointly with the various religious organizations until 1969 when it assumed sole responsibility for running the schools. For accounts of some of the physical, sexual, psychological, spiritual, and cultural abuses that occurred at IRS, see Agnes

out-of-home care facilities such as foster care and while attending day schools. Efforts have been made by the Federal government in partnership with the churches that ran IRS to reach non-judicial settlements with former students. An Alternative Dispute Resolution (ADR) process was established in 2003.[2] The Federal Government and Aboriginal leaders reached a tentative agreement in November 2005 - the *Agreement in Principle* (AIP) towards a Fair and Lasting Solution of the Legacy of Indian Residential Schools - to provide a more encompassing and improved non-judicial process for all former IRS students.[3] In May 2006, the Federal Government approved the *Indian Residential Schools Settlement Agreement* and launched an Advance Payment program for the immediate compensation of eligible recipients over 65 years old.[4] Some former students have indicated preference for effective non-judicial resolutions, among other things, to avoid litigation with its attendant costs, delays, and emotional difficulties in testifying about abuse in an adversarial system with no guarantee of success. In an address by the Chief of the Assembly of First Nations, Phil Fontaine, also a former IRS student, when the AIP was announced in 2005, he commended the *Agreement*, and called it a historic milestone in recognizing Aboriginal people as equal citizens.

The *Agreement* does not eliminate the possibility of some victims choosing to pursue abuse claims through the tort system. Some victims of IRS-related abuses will choose to litigate before a final agreement is reached. Others may opt out of the *Agreement* after it comes into force or may miss the Common Experience Payment (CEP) and/or Improved Appeal Process (IAP) deadlines.[5] The *Agreement* anticipates referral of cases to court in certain circumstances: where the claimant's actual losses exceed the limit allowed under the IAP, or where the courts are deemed to be the appropriate forum to deal with evidence necessary to substantiate the allegations in question either because of their complexity or their volume. These claims will be subject to the normal rules of litigation in similar cases.[6] It is therefore important to ensure that those who choose to litigate have a meaningful choice. As well, the *Agreement* only covers IRS-related claims. Although this is broadly defined, it does not include persons who suffered

---

Grant, *No End of Grief: Indian Residential Schools in Canada* (Winnipeg, Man.: Pemmican Publications, 1996), c.xi.

2 *Alternative Dispute Resolution*, Online: Indian Residential Schools Resolution Canada, <http://www.irsr-rqpi.gc.ca/english/dispute_resolution.html> (last accessed Sept. 12, 2006).

3 Indian Residential Schools Resolution Canada, *News Release: Government of Canada Announces Agreement in Principle towards a Fair and Lasting Solution of the Legacy of Indian Residential Schools*, Online: Indian Residential Schools Resolution Canada, <http://www.irsr-rqpi.gc.ca/english/news_23_11_05.html> (last accessed: Sept 12, 2006).

4 Indian Residential Schools Resolution Canada, News Release, "Government of Canada Approves Indian Residential Schools Settlement Agreement and Launches Advance Payment Program", Online: Indian Residential Schools Resolution Canada, Online: < http://www.irsr-rqpi.gc.ca/english/news_10_05_06.html> (last accessed: Sept. 12, 2006).

5 Eligible recipients who miss the deadlines for the CEP and/or IAP applications may lose the right to make such claims. See *Re Residential Schools Class Action Litigation* (8 May 2006) at 5.04(2) - (5), 6.02(1) - (2), Online: Official Court Notice for Residential Schools Settlement <http://www.residentialschoolsettlement.ca/settlement.pdf> (last accessed: Oct. 1, 2006) [*IRS Settlement Agreement*].

6 *Ibid.* Schedule "D" at p. 8.

abuse in other settings, such as foster homes or day schools.[7] Also excluded are persons who suffered abuses in residential schools other than IRS such as Mennonite run residential schools. Examples of such institutions are Stirland Lake and Crystal Lake residential schools in Ontario.[8] Thus, an examination of the way the legal system addresses historical claims by Aboriginal people victimized in state or institutional care is still important. As well, the ADR processes rely on legal analyses and tests adopted in court decisions to determine appropriate rules and ranges of compensation to be followed by independent adjudicators.[9] It is therefore useful to have a litigation process that is attentive to the context in which the claims emerged, including the complexities of having to untangle the effects of other tortious and non-tortious factors that have impacted claimants' lives. So far, courts have shown a commitment to formal equality in their treatment of claims by Aboriginal victims of historical/institutional abuses by insisting on application of general tort law principles without much regard to the context of these claims. A de-contextualized approach often results in injustice and a sense of disappointment for claimants.[10]

This paper will explore the extent to which the expressed desire to reconcile relations between Aboriginal and non-Aboriginal Canadians can be reflected in defence tactics, and how courts can better respond to these claims. I argue that the application of seemingly neutral legal principles in determining liability and the assessment of damages, such as causation and contingency deductions de-contextualize the claims, limit the scope of inquiry, and ultimately result in depressed damage awards. The decisions do not reflect claimants' experiences of abuse and its effects on their lives. This is not only demoralizing for claimants but is also likely to limit adjudication as a viable option for claimants, forcing many former IRS students to accept non-judicial resolutions and leaving those not eligible under those processes with no real remedy. Ultimately, this may discourage suits, prevent access to justice and prevent an opportunity for the rest of society to learn about abuses suffered while in state care and fail to safeguard against future abuses in similar settings. This paper briefly notes some of the detrimental effects that colonization, and racist and assimilation policies have inflicted upon Aboriginal people. The link

---

7 See definitions of "Eligible CEP Recipient", "Eligible IAP Claimant" and "Indian Residential Schools", *ibid.* at 1.01

8 The Assembly of First Nations has indicated its support to have these institutions added to the list of IRS under the Agreement in Principle. See Annual General Assembly Resolution *34/2005*: Recognition of Indian Residential Schools, Online: Assembly of First Nations < http://www.afn.ca/article.asp?id=1872 > However, the federal government has not as yet included former students of Crystal Lake and Stirland Lake residential schools within the scope of the IRS Settlement Agreement. See *ibid.* at Schedule "F".

9 *Compensation in ADR*, Online: Indian Residential School Resolution Canada < http://www.irsr-rqpi.gc.ca/english/dispute_resolution_compensation.html >. Similarly, the IRS Agreement in Principle states that the rules of causation and assessment of damages within the Compensation Rules will be determined by reference to similar cases decided by courts. *Supra* note 5, at 6, 8, 12.

10 For example, in *Plint*, Smith J.A. expressed sympathy for the situation of IRS survivors but concluded that such emotions should not stand in the way of principled application of legal rules. Recovery was therefore limited only to proven sexual assaults. *Blackwater v. Plint* (2004), 235 D.L.R. (4th) 60 at 103-104, 21 B.C.L.R. (4th) 1 at paras. 127-28 (B.C.C.A.) rev'd on other grounds. *Blackwater v. Plint* (2005), 258 D.L.R. (4th) 275 (S.C.C.).

between these historical factors and processes on the one hand and the current socio-economic marginalization of Aboriginal people on the other is established to buttress the need for a contextual analysis in responding to claims of historical and institutional abuses. Next, the paper highlights the salient elements of the *IRS Agreement*, followed by the importance of assessing cases of abuse initiated by Aboriginal claimants against the backdrop of therapeutic jurisprudence. The paper then goes on to show the discriminatory effects of application of general tort principles in these cases. I focus on how courts establish the boundaries of inquiry and the construction of plaintiffs' original positions for purposes of determining losses attributable to defendants' tortious conduct. Lastly, the paper addresses the detrimental impact of the limitation defence in some jurisdictions as well as the discriminatory assessment of damages.

II. CONTEXT: ACCOUNTING FOR THE SOCIO-ECONOMIC MARGINALIZATION OF ABORIGINAL PEOPLES AND COMMUNITIES IN CONTEMPORARY CANADIAN SOCIETY

Aboriginal peoples have suffered various forms of discrimination at the hands of the settler society and now Canada. In an attempt to 'civilize' Aboriginal people, the Canadian government established residential schools under the authority of the *Indian Act* and in pursuance of its responsibility for 'educating' Aboriginal peoples. The principal objective of residential schools was to assimilate Aboriginal people by re-socializing their children with a resulting breakdown of Aboriginal family structures and communities generally.[11] The residential school system has been described as an engine of the colonial system and a major force in the marginalization of Aboriginal people.[12] The running of the schools was left in the hands of church groups, which also had an interest in converting the 'heathen Indian' to Christianity. Aboriginal children were forcibly removed from their families and communities to attend IRS. They were supposed to be civilized by learning European cultural values and forgetting the Aboriginal way of life. Aboriginal culture, belief systems, language and way of life were denigrated and eventually eroded under the powerful influence of Eurocentric values that were touted as superior. Children were prohibited from speaking their language and observing their traditions. The schools were often set up in remote locations and were under-funded. Employees had complete control

---

11 See Manitoba, Aboriginal Justice Inquiry, *Report of the Aboriginal Justice Inquiry of Manitoba*, Vol. 1, *The Justice System and Aboriginal People*, 513 -14. The history of Indian residential schools and the treatment of Aboriginal children in those institutions have been well documented. Only a brief overview is provided here to contextualize the current situation of many Aboriginal people and support this paper's goal to show that a contextualized application of tort law principles is required to do justice in historical abuse claims by Aboriginal people to avoid re-victimization. For examples of the legacy of colonization and assimilation of Aboriginal people, see Royal Commission on Aboriginal Peoples, *Looking Forward, Looking Back*, vol. 1 (Ottawa: Canadian Communication Group, 1996), c.10; Grant, *supra* note 1 at 23-4, 273; Maggie Hodgson, "Rebuilding Community After the Residential School Experience" in Diane Englestad & John Bird eds., *Nation to Nation: Aboriginal Sovereignty and the Future of Canada* (Concord, Ont.: Anansi, 1992) 101 at 103-9.

12 *Looking Forward, Looking Back, Ibid.* at 333-7.

over the children. The totalizing way in which the institutions were run rendered the children vulnerable to abuse. The children were routinely subjected to physical, verbal, sexual, emotional and spiritual abuse, and received sub-standard education.[13] They were deprived of support systems on which they could have relied to resist and/or cope with abuses. Siblings who attended the same institution were separated and contact with family and community members was limited.[14]

IRS survivors returned to their families and communities having suffered a loss of identity and culture and the devastating effects of abuse. This led in some cases to lasting emotional difficulties that affected future relationships with partners and children and caused family difficulties and breakdowns. The disproportionate number of Aboriginal children in the child welfare[15] and criminal justice systems is partly attributable to the legacies of colonization including forced attendance at IRS.[16]

The economic impacts on Aboriginal communities are significant: high unemployment, reliance on social assistance and a cycle of poverty.[17] Many

---

13 *Looking Forward, Looking Back*, *supra* note 11. Grant notes that from an educational perspective, the "Residential schools were a dismal failure." A few students did well and the standards improved with the later generations in some schools but this was still sub-standard compared to what was available in the mainstream schools. Grant, *supra* note 1, at 84. She notes that this was part of the colonial and ethnocentric design intended to reinforce racist perceptions of Aboriginal people as inferior to justify their marginalization. *Ibid.* at 166-7. For a general discussion of the educational environment at Indian Residential Schools, see Grant, *supra* note 1 at c. VIII.

14 See Law Commission of Canada, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions* (March 2000) at 27-31, 65; *Surviving the Past - Options for Dealing with Abuse* (2005) "Understanding Institutional Child Abuse" and "Indian Residential Schools", Online: Law Courts Education Society BC http://www.survivingthepast.ca/index.html (last accessed: Sept. 12, 2006); Grant, *supra* note 1at 23, c. V, 182-3.

15 For examples of the over-representation of Aboriginal children in the child welfare system, see Nico Tromé, Della Knoke & Cindy Blackstock, *Pathways to Overrepresentation of Aboriginal Children in the Child Welfare System in Canada*, 8 -11 (Centre of Excellence for Child Welfare, 2004); "MOU for Aboriginal Children in Care (2002)" Online: Ministry for Children and Family Development <http://www.mcf.gov.bc.ca/about_us/aboriginal/mou.htm> (last accessed: Sept. 12, 2006).

16 "Strengthening Families" Final Report (Manitoba, 2001) c. 10, Online: Aboriginal Justice Implementation Commission <http://www.ajic.mb.ca/reports/final_ch10.html> (last accessed: Sept. 12, 2006). See also "Aboriginal Child Welfare: Wounds and Work, Healing and Hope", Vocal Point, Spring 2005, Online: The Society for Children and Youth of BC <http://www.scyofbc.org/site_assets/www.scyofbc.org/images/dynamic/scy_vp_extract.pdf > (last accessed: Sept. 12, 2006).

17 Although the socio-economic conditions of some Aboriginal people, particularly some urban Aboriginal populations, have been improving, the overall situation of many Aboriginal people lags behind that of many non-Aboriginal Canadians. Aboriginal people continue to be among the poorest Canadians with a significantly higher unemployment rate, part-time or seasonal employment and reliance on social assistance than non-Aboriginal Canadians. See Statistics Canada, "Labour Force Survey: Western Canada's off-reserve Aboriginal Population, April 2004 - March 2005" *The Daily*, (June 13, 2005), Online: Statistics Canada <http://www.statcan.ca/Daily/English/050613/d050613a.htm> (last accessed: Sept. 12, 2006), Andrew Siggner & Rosalinda Costa, "Aboriginal Conditions in Census Metropolitan Areas, 1981-2001 (Statistics Canada, June 23, 2005), Online: Statistics Canada <http://www.statcan.ca/bsolc/english/bsolc?catno=89-613-MIE2005008#formatdisp> (last accessed: Sept. 12, 2006); *Aboriginal Peoples and the Criminal Justice System*, A Special Issue of the Bulletin, May 15, 2000, Part III, Online: Canadian Criminal Justice Association

Aboriginal people have been negatively affected by social differentiation orchestrated by the settler society,[18] and by the resulting "politics of difference" that disproportionately affects them. A substantial underclass of Aboriginal people has resulted from this experience.[19] The correlation between the legacy of years of colonization, assimilation, systemic racism and oppression, and the current situation of many Aboriginal people is aptly summarized by the Canadian Criminal Justice Association:

> The historical problems of many Aboriginal peoples stem directly from assimilation, which fundamentally changed the economic, political and social life – indeed the very culture – of First Nations people. Assimilation policies were based partly on the European belief that Aboriginal people were uncivilized and incapable of governing themselves. As a result of the devaluation of their language, traditions and customs after this experience, Aboriginal people began to suffer cultural uncertainties. The cultural crisis can be linked to specific problems that currently plague Aboriginal communities including disproportionate levels of Aboriginal incarceration, poverty, unemployment, alcohol abuse, domestic violence, and an absence of economic self-sufficiency and business infrastructure.[20]

In light of the complex historical factors and processes that have contributed to this situation and its inter- and multi-generational effects on many Aboriginal people and communities, substantive equality demands sensitivity in responding to claims of abuse in government care. This calls for contextualised analyses and application of tort law principles relevant to these claims in ways that recognize these connections, their causes, and their effects on claimants' lives and harms resulting from abuse.

III. OVERVIEW OF THE *IRS SETTLEMENT AGREEMENT*

The *IRS Settlement Agreement* recognizes the negative experiences of every child who attended an *IRS* or suffered an *IRS*-related abuse, and the legacy of the *IRS* experience for Aboriginal peoples and communities. To show the government's desire to heal and repair the damaged relationship between

---

<http://www.ccja-acjp.ca/en/aborit.html> (last accessed: Sept. 12, 2006); Terry Wotherspoon, "Aboriginal People, Public Policy and Social Differentiation" in Danielle Juteau, *Social Differentiation: Patterns and Processes* (Toronto: University of Toronto Press, 2003), 155, 175-182; Jane Dickson-Gilmore and Carol La Prarie, *Will the Circle be Unbroken: Aboriginal Communities, Restorative Justice and the Challenges of Conflict and Change* (Toronto: University of Toronto Press, 2005) at 20-21.

18 Social differentiation is the process whereby groups of people are assigned to "different social positions and circumstances characterized by unequal resources, opportunities and life chances." Wotherspoon, *Ibid.* at 156-7.

19 Wotherspoon, *supra* note 17 at 176, 181.

20 *Aboriginal People and the Criminal Justice System,* A Special Issue of the Bulletin, May 5, 2000, Part I, "Summary", Online: Canadian Criminal Justice Association, <http://www.ccja-acjp.ca/en/abori1.html> (last accessed: Sept. 12, 2006).

Aboriginal and non-Aboriginal Canadians due to the *IRS* experience, the *Agreement* proposes a Common Experience Payment (CEP) to be made to eligible former students who do not opt out of the *Agreement* ($10,000 for the first year of attendance at an *IRS* and $3,000 for every subsequent year in attendance at an *IRS*).[21] Claimants who have already settled their claims through litigation or the DR process are also entitled to the CEP. An improved DR process, the Independent Assessment Process (IAP), will be established to address claims of sexual and most serious physical abuses arising from or connected to the operation of an IRS. Eligible claimants include persons who were victimized while under the age of 21, and though not students of an IRS, were authorized by an adult employee to be on the premises of an IRS for purposes of participating in school activities. Compensable abuses include physical and sexual abuses and conduct causing serious psychological consequences perpetrated by adult employees and other adults authorized to be on school premises. It extends to abuses committed by such persons on and off school premises and committed both when school was in and out of session. The *Agreement* also covers abuses committed by students, provided the claimant can establish actual or constructive knowledge on the part of school officials, that the type of abuse in issue was occurring at the institution and they took no reasonable steps to prevent it. A reverse onus is adopted for claims of serious sexual exploitation perpetrated by students; claims will be validated where defendants cannot prove "on a balance of probabilities that reasonable supervision was in place at the time" of the abuse.[22]

Hearings will be closed to the public. Information disclosed at the hearings will remain confidential. No person involved in the hearing can disclose information obtained in the process except his or her own testimony or as permitted by law. Claimants will, however, be free to publicly discuss the decision in their claims including the amount of compensation awarded. The *Agreement* provides for an internal review of decisions; parties are entitled to have decisions reviewed by a second adjudicator to determine whether they contain palpable and overriding errors, and if so, the reviewing adjudicator may substitute their own decision or order a new hearing. Parties may also request the Chief Adjudicator or their designate to determine whether a decision properly applied the IAP Model to the proven facts and if not, to rectify the error.[23] The Chief Adjudicator's decision refusing to admit a claim into the IAP process is final.

Adjudicators will use a holistic and contextual approach in determining levels of compensation.[24] Compensation levels under the IAP will be determined based on the nature, duration and frequency of proven acts of abuse, proven aggravating factors and impact of abuse on claimant, as well as consequential harms resulting from the experience. Claimants may be entitled to future care costs including cost of psychiatric treatment to a maximum of $15,000, and consequential loss of opportunity or actual income loss to a maximum of $250,000. The total amount of compensation to be recovered is

21 *Supra* note 5, Article 5.

22 *Ibid.* Schedule "D" – Independent Assessment Process, Section I, "Compensable Abuse" p. 2.

23 *Ibid.* Schedule "D", section I at p. 14.

24 *Ibid.* Schedule "D", p. 34.

not to exceed $275,000. The ultimate amount to be awarded depends on the discretion of the adjudicator having regard to the totality of the proven facts and their impacts on the claimant. Levels of compensation are to be consistent with or more generous than what claimants would have been entitled to in court in similar situations.

Eligible recipients who receive the CEP may also be entitled to a further amount to a maximum of $3000 per person in the form of personal credits, if the amount set aside for CEP compensation exceeds the amount required by at least $40,000,000.[25] Acceptance of the CEP constitutes a release of the federal government and churches that ran the school from all further liability relating to the *IRS* experience except claims of sexual and serious physical abuse that will be addressed by the IAP.[26] Eligible recipients who accept the CEP cannot have their claims for sexual and/or serious physical abuse litigated in court except where the IAP is deemed an inappropriate forum for the claim. This may arise where the claimant's actual losses exceed the maximum recoverable under the IAP or if the nature of the evidence in question is best handled by courts. The federal government will pay all compensation awarded by the IAP in full. It is expected that payments received under the *Agreement* will not affect eligibility, nature and duration of any past and future social assistance benefits.[27]

The *Agreement* adopts a broader view of *IRS*-related harms and a holistic approach to addressing the legacies of *IRS*. It recognizes that the detrimental effects of *IRS* are felt not only by former students but also by their families and communities. In addition to the individual compensation packages, the *Agreement* also calls for initiatives to help remedy the legacies of *IRS* generally for former students, their families and communities and promote reconciliation between Aboriginal and non-Aboriginal Canadians. Additional funding is to be provided for the Commemoration program and the Aboriginal Healing Foundation.[28] More importantly, the *Agreement* calls for the creation of a Truth and Reconciliation Commission (TRC) to provide survivors, their families and communities a culturally-appropriate forum to share their *IRS* experiences and its impact on them.[29] The TRC will be composed of an *IRS* Survivor Committee (made up of ten representatives of Aboriginal organizations and survivor groups reflecting the regional distribution of *IRS*), a commission (comprised of three commissioners, at least one of whom should be Aboriginal) and regional liaisons. The TRC is intended to be a public and educational process that will create a historical record of the *IRS* system and its legacy. Focus will be on ascertaining what occurred in *IRS* and its continuing legacy and not simply on "relevant facts" necessary to establishing legal liability. It is expected that the process will be a source of healing and empowerment for victims, their families and

25 *Ibid.* Section 5.07(3).

26 *Ibid.* Article 11.01 and 11.02.

27 *Ibid.* Article 3.06 states that the federal government and other parties will endeavour to reach agreements with provincial, territorial governments and any federal department to ensure that payments under the settlement agreement will not affect social assistance benefits that recipients may otherwise be entitled to.

28 *Ibid.* Section 3.02, Article 8.

29 *Ibid.* Section 3.03, Article 7.

communities. Participation in the TRC will be voluntary. Victims' stories will be kept confidential if they so desire. The TRC is expected to establish a research centre and a repository for the records that will be publicly accessible. It is expected that the records will be integrated into the curricula of educational institutions with the hope of educating non-Aboriginal Canadians about the IRS experience and its impact on Aboriginal people, and promote a better understanding of the current situation of Aboriginal Canadians.[30]

The *Agreement in Principle* is commendable. However, there are few areas of potential unfairness that would hopefully be remedied in the final agreement. For instance, eligible recipients who have already obtained judgment for their *IRS* claims are entitled to receive the CEP in addition to damages obtained for actionable torts.[31] Such claimants may also be entitled to seek compensation under the IAP for other claims dismissed in litigation, for example statute-barred physical abuses, if they are validated. This may be potentially unfair to former students who would like to receive the CEP while maintaining the option of litigating claims for sexual and physical abuse because they may have better prospects of higher damages or simply preserve their choice of forum in which to pursue their claims.[32] Not having a right of appeal and an opportunity to litigate allegations of physical and sexual abuses not admitted to the IAP process could be unfair for claimants who have already received the CEP and hence released the defendants from further liability.

Further, claimants who have retained counsel, other than those in the National Consortium or the Merchant Law Group, and who wish to obtain compensation under the *Settlement Agreement* will have to pay for their own legal fees and disbursement in relation to work done before the signing of the *AIP*. There is also a $4,000 limit on legal fees that may be claimed in respect of outstanding work in progress at the time of the *AIP*.[33] Given the nature of *IRS* claims and the federal government's aggressive defence tactics, claimants have incurred significant costs to obtain relevant evidence to substantiate their claims. The limit on legal fees will be a disincentive for claimants with pre-existing law suits who are otherwise eligible CEP recipients from participating in the *Settlement Agreement* because the amount awarded will be absorbed by their legal fees for the pre-existing law suits. Claimants in this situation will likely have to opt out or their lawyers will have to waive substantial amounts in legal fees to allow their clients to participate in the *Settlement Agreement*. Meanwhile, claimants with lawyers in the Merchant Law Group or National Consortium do not face this dilemma. Thus, the *Settlement Agreement* as it is currently structured, unfairly discriminates against claimants based on their choice of counsel. This is inconsistent with the Government's stated desire to

30 *Ibid.* Schedule "E".

31 *Ibid.* Section 15.01 (1).

32 Although plaintiffs in provinces like British Columbia have not been able to litigate non-sexual abuses for being statute barred (for example, see *Plint*, *supra* note 7), plaintiffs in Saskatchewan and Manitoba have no such impediment to pursuing their claims because these claims are not subject to limitation periods (*Limitations Act*, S.S. 2004, c. L- 16.1, s. 16.(1) (b)(2); *The Limitation of Actions Act* of Manitoba, C.C.S.M. c. L150, s. 2.1(2)(b)). It is conceivable that some claimants in these jurisdictions may welcome the option of litigating specific abuses after receipt of the CEP.

33 *Supra* note 5, Article 13.06.

treat all *IRS* survivors fairly. Some plaintiff lawyers who are not part of the National Consortium have complained about this unfairness to their clients and it is hoped that this anomaly will be rectified before the *Agreement* is finalized.

As a non-Aboriginal Canadian, I do not want to use my outsider subject position to make value judgments about efforts to find solutions to the legacies of *IRS* for former students, their families and communities. If the media reports are of any indication, they seem to reflect broad base support for the historic agreement by Aboriginal people. It is likely that many survivors would want to pursue their claims through the settlement process to be established under the *Agreement.* However, this does not foreclose the possibility of resolving some of the *IRS*-related claims through litigation. The settlement process is not mandatory. It is up to eligible claimants to determine which redress avenue is best for them. The CEP will likely be an attractive option for many former students, especially those who do not intend to pursue claims for sexual and/or serious physical abuses. However, it is anticipated that some former students will opt-out of the *Agreement* following court approval. The scheme will still come into force if no more than 5,000 former students opt out.[34] It is to be expected that some if not all of those who opt out might choose to litigate.[35]

IV. IMPORTANCE OF THERAPEUTIC APPROACH TO CLAIMS OF ABORIGINAL VICTIMS OF HISTORICAL ABUSES

Therapeutic jurisprudence was originally developed in the context of mental health law. The essence of therapeutic jurisprudence is to challenge the legal system or law so as to go beyond the rhetoric of rights to ascertain the actual effect of laws and legal institutions on the lives of those affected. Emphasis is on the healing effects of law or beneficial outcomes of one's engagement with the legal process. Proponents of therapeutic jurisprudence suggest that efforts should be made to minimize the detrimental effects of laws and maximize the healing or therapeutic benefits without compromising fundamental principles of justice. The focus of inquiry is the extent to which the law or legal principle promotes the psychological and physical well-being of those affected.[36] Though often conceived in terms of intangible or psychological benefits, therapeutic benefits can also arise from financial compensation. As Kenneth Whyte notes:

---

34 *Ibid.* Section 4.14.

35 The *IRS Settlement Agreement* provides an appeal process in relation to CEP applications (Section 5.04 (8) and Section 5.09) but is silent on an appeal process for IAP applications. It is reasonable to assume that the decisions of the National Certification Committee regarding admissibility of claims into the IAP will be final.

36 David Wexler, "Therapeutic Jurisprudence" (2004-2005), 20 Touro L. Rev. 353 at 356; Bruce Feldthusen, Olena Hankivsky & Lorraine Greaves, "Therapeutic Consequences of Civil Actions for Damages and Compensation Claims by Victims of Sexual Abuse" (2000), 12 C.J.W.L. 66 at 70; Shirley Abrahamson, "Therapeutic Jurisprudence: Issues, Analysis and Applications" (2000) 24 Seattle U.L. Rev. 223. Nathalie Des Rosiers, "Rights are Not enough: Therapeutic Jurisprudence Lessons for Law Reformers" (2001-2002), 18 Touro L. Rev. 443.

> Some descriptions of the current needs of survivors will downplay the importance of financial compensation, emphasizing instead acknowledgement, apology, accountability, therapy and education. There is no reason to do so. Money is the way the ... legal system compensates for injuries wrongfully caused by others ... Financial compensation is, in some ways, the most basic material need of survivors ...[37]

The importance of financial compensation for claimants is evidenced by the fact that they often sue not just the perpetrator but also third parties who would often be in a position to satisfy damages awards. This underscores the importance of "fair compensation" to survivors, a feeling that some person(s) is responsible for the abuse they suffered and for its effects on their lives although no amount of money can fully compensate for their loss.[38] Expressions of outrage and disappointment for the awards to six former students of the Alberni Indian Residential School, which ranged from $12,000 to $190,000, emphasize the importance of fair and adequate compensation in the therapeutic process. The awards were perceived to reflect the devaluation both of victims' lives and losses as well as the effects of abuse on their families and communities. The awards constitute re-victimization of Aboriginal people.

Financial compensation may, therefore, be essential in plaintiffs' healing or in their coming to terms with the effects of abuse.[39] Although there can never be adequate financial compensation for something as serious as childhood abuse, a feeling of fairness in both the process and outcome can be possible and important in promoting healing.[40] The restorative goal of tort damages intended to make the victim whole is consistent with focus on beneficial outcomes in therapeutic jurisprudence.[41] It is important for Aboriginal survivors of institutional abuse, their families and communities not to feel re-victimized in terms of what they can expect from the tort system based on their Aboriginal status. As well, low damages or feelings of unfairness would likely be a disincentive to instituting claims.[42] Damages for impaired past and

---

37 Kenneth Whyte, *Options for Dealing with Abuse: Facilitator's Guide*, 1-35. See also *Surviving the Past -Options for Dealing with Abuse* (2005) "Needs of Survivors", online: Law Courts Education Society of BC <http://www.survivingthepast.ca/options.html> (last accessed: Sept. 12, 2006).

38 See Joseph W. Singer, *Entitlement: The Paradoxes of Property* (New Haven: Yale Univ. Press, 2000) at 195-196; *Surviving the Past* - Options *for Dealing with Abuse* (2005), *ibid.*

39 See Feldthusen, et al, *supra* note 36 at 75. See also *Restoring Dignity, supra* note 14 at 79-80.

40 See Judith Herman, *Trauma and Recovery* (New York: Basic Books, 1992) at 190. For a discussion of the importance of compensation in repairing past and present injustices and improve future relations, see Martha Minow, *Between Vengeance and Forgiveness* (Boston: Beacon Press, 1998), chapter 5. Given the inequality that has marked relations between victims and institutional defendants, and the differences in financial and other resources in the litigation process, victims already feel a huge sense of powerlessness. It is important that the process alleviates feelings of inequality and powerlessness and make survivors feel they are valued as persons with equal worth and dignity.

41 See Daniel W. Shuman, "Making the World a Better Place through Tort Law? Through the Therapeutic Looking Glass" (1993) 10 N.Y.L. Sch. J. Hum Rts. 739.

42 See statement released by the B.C. Provincial Residential School Project (now Indian Residential School Survivors Society) after the trial decision in *W.R.B. v. Plint*, "Provincial

future working capacity tend to be an important component of damages awards. Principles that severely limit recovery of this aspect of plaintiffs' claims are likely to discourage suit and thereby impede access to justice.[43] Aboriginal plaintiffs are often awarded lower compensation for impaired working capacity, among other things, because their material prospects are often thought not to be promising even if they had not been injured.[44] Survivors, who choose to litigate, face further obstacles generally and more so for Aboriginal claimants.[45]

The claims in question are distinguishable from ordinary cases that often are between strangers and do not require as much attention to broader issues of inequalities such as prior relationships of domination and oppression that have precipitated the claim. Hence, the need to use the dispute resolution process to reconcile damaged relations while providing meaningful remedies does not often arise in the 'run of the mill' tort cases. In contrast, the claims by Aboriginal victims of institutional and historical abuse stem mostly from the racist and assimilationist policies instituted by the settler society based on perceived inferiority of Aboriginal people. Aboriginal people have paid a heavy price for these policies and practices; they were denied their basic human dignity and equal worth and were often placed in harm's way, which incidentally produced these claims. Many of the claims for compensation arise from the Government's actions of removing children from their families at a very young age, and of placing them in strange environments where their culture, language, religion and way of life were all denigrated and prohibited. Vulnerable children became the subject of emotional, physical and sexual abuse at the hands of the authority figures in their lives. These authorities were supposed to look after the well being of the children. This abuse has left enduring scars for individual Aboriginals and their communities. There is, therefore, a greater need to approach these claims with sensitivity, grounded in an ethic of care for the well-being of survivors and from a social justice perspective in ways that enhance the therapeutic benefits for claimants and their communities. As well, substantive equality requires a contextualized application of legal principles in relation to historically marginalized groups. The process of seeking redress and the outcome should be an opportunity for healing and reconciliation. It is both frustrating and unfair for defendants and courts to subject these claims to seemingly neutral legal principles developed in wholly different contexts that have no bearing on the racist and assimilationist ideologies that underpinned the relationship between plaintiffs

---

Residential School Project outraged by B.C. Supreme Court Ruling (July 11, 2001), in Whyte, *supra* note 37, at 1-70. The awards were upheld on appeal with the exception that one of the plaintiffs, F.L.B., was awarded a conventional sum of $20,000 for impaired capacity to work: *Blackwater v. Plint* (2004), 235 D.L.R. (4th) 60 at 128, 21 B.C.L.R. (4th) 1, 64-5 (B.C.C.A.), aff'd. *Blackwater v. Plint* (2005), 258 D.L.R. (4th) 275 at 299 (S.C.C.).

43 See Elizabeth K.P. Grace, "Judging Cause and Effects: Challenges and Trends in Assessing Damages in Sexual Abuse Cases" in *The Law Society of Upper Canada, Special Lectures 2005; The Modern Law of Damages* (Toronto: Irwin Law, 2006) 177 at 182.

44 See Elizabeth Adjin-Tettey, "Replicating and Perpetuating Inequalities in Personal Injury Claims through Female-Specific Contingencies" (2004) 49 McGill L.J. 309 at 333-341.

45 The link between colonization, assimilation including forced attendance at IRS and abuse at those institutions, and the current poor socio-economic conditions of many Aboriginal people has already been discussed in section II above.

and defendants and the nature of the claimants' experiences.[46] A contextualized approach aimed at substantive equality would be a gesture of good faith that shows genuine effort to redress some of the legacies of oppression, dispossessions and forced assimilation. It could also promote healing and reconciliation, and restore relations between Aboriginal and non-Aboriginal Canadians.

Therapeutic jurisprudence has been found appropriate in relation to victims who suffer long-term psychological consequences from abuse, such as sexual abuse victims. There is a real need to ensure that victims' long-term needs are satisfied through the adjudication process. The same is true for Aboriginal victims of institutional/historical abuse as well as abuses while in government care generally. This is so because of the long-term devastating impact of the legacy of abuse on individual survivors, their families and communities.[47] The effects of abuse together with the general treatment of Aboriginal peoples by the settler society has cast a dark shadow on Canada's history and affected relations between Aboriginal and non-Aboriginal peoples. It is, therefore, important that any process of seeking redress for abuses should also be used as a vehicle to promote personal and communal healing, as well as reconciliation between Aboriginal and non-Aboriginal Canadians.[48]

Adequacy of the process is to be judged by how well it addresses the full range of harms suffered by survivors, their families and communities.[49] This is not to suggest that the litigation process is necessarily best suited to achieve these goals. In fact, some former IRS students have described litigation as extremely painful and anything but therapeutic. However, as Vella and Grace point out, the tort system may be the best mechanism for accountability and

---

46 The racist assumptions underlying establishment of IRS continues to be played out in the apprehension of children by child welfare agencies often based on racist assumptions/ideologies of good parenthood that evaluate parenting capacities of Aboriginals against Euro-Canadian standards which often portrays them as bad parents. Apprehension of Aboriginal children and their placement in, or adoption out of Aboriginal communities, where they are sometimes subjected to physical, sexual and emotional abuses, has also been perceived as assimilationist. The child welfare system has been dubbed the modern equivalent of IRS for Aboriginal children. See Hamilton and Sinclair, *Aboriginal Justice Inquiry of Manitoba*, *supra* note 11 at 519-20; Marlee Kline, "Complicating the Ideology of Motherhood: Child Welfare and First Nation Women" (1993) 18 Queen's L.J. 306.

47 See *Restoring Dignity*, *supra* note 14 at 54 - 61.

48 The Aboriginal Healing Foundation was established in 1998 as part of implementing the recommendations of the Royal Commission on Aboriginal Peoples. In keeping with Aboriginal tradition the purpose of the Healing Foundation is to promote healing among Aboriginal people and reconciliation between Aboriginal and non-Aboriginal peoples. Focus is on the consequences of institutionalization of children for Aboriginal communities generally and not just the individuals who went through those institutions because the effects are felt not just by them but also their families and entire communities. In this sense, the Law Commission of Canada supports a broader conception of survivors to include the families and communities of individual survivors. It also emphasizes the importance of a holistic approach in redressing harms to Aboriginal individuals, families and communities arising from the residential school experience. These sentiments are echoed in the IRS Agreement in Principle. The benefits of therapeutic approach should not be limited to claimants who choose non-judicial dispute resolution processes. Online: Aboriginal Healing Foundation <http://www.ahf.ca/e_Values.aspx> (last accessed: Sept. 12, 2006); *Restoring Dignity*, *supra* note 14 at 49, 53.

49 See *Restoring Dignity*, *supra* note 14 at 56.

redress currently available to some survivors, although there is room for improvement.[50] Though not all victims will find litigation desirable, a meaningful adjudication process must be preserved for those who choose it. Further, it might be the only viable avenue for redress for some victims, especially those not eligible under dispute resolution agreements. This paper proposes that in the spirit of reconciliation, greater attention needs to be paid to the effect of abuse on survivors and efforts should be made to ensure that they obtain therapeutic benefits from the litigation process to the extent possible. Defendants should ensure that the process of seeking redress does not further alienate claimants and exacerbate their vulnerability in Canadian society. Defendants should be willing to make compromises that would enhance healing and reconciliation, and engender trust between Aboriginal and non-Aboriginal people.[51] For example, this would mean that where abuse is not disputed, defendants, usually the government and/or church organizations should show good faith by not insisting on formalistic constructions of plaintiffs' original position or negative contingency deductions that would whittle away the tangible benefits from the process. Such an approach could also encourage meaningful out-of-court settlements and avoid the painful process of litigation when liability is not in issue.

Formalistic application of principles such as causation and *restitutio in integrum*, though not specifically directed towards Aboriginal survivors of institutional and other abuses or even Aboriginal people generally, could detrimentally affect their claims. They could also undermine expectations of therapeutic and material benefits from redress. Therapeutic jurisprudence ensures that engagement with the legal system does not cause harm to legal subjects. Thus, efforts should be made to avoid what has been termed "jurigenic harm".[52] Effects of abuse often impair the ability of victims to live meaningful lives, including the development of addictions and difficulties in holding down jobs, often resulting in socio-economic marginalization. Financial compensation to help alleviate these difficulties is often essential for healing.[53] Some plaintiffs may experience intangible benefits from successful

---

50 Susan M. Vella & Elizabeth K.P. Grace, "Pathways to Justice for Residential School Claimants: Is the Civil Justice System Working?" in, Dwight A. Dorey & Joseph Eliot Magnet, eds. *Aboriginal Rights Litigation* (Toronto: Butterworths, 2003) 195 at 262-5. It does not appear that the legal actors, especially institutional defendants are sensitive to the consequences of the litigation process and the ultimate award of damages on the survivors.

51 Racist perceptions of Aboriginal people as inferior and uncivilized influenced their marginalization and the institutionalization of their children as part of the assimilation agenda intended to re-socialise Aboriginal children. Abuse of children by those who were expected to protect and nurture them and silence on the part of governments and the churches that ran those institutions was a breach of the children's trust, which has in turn affected relations between Aboriginal people and the state. See *Restoring Dignity*, *supra* note 14 at 14, 22, 26, 49; Grant, *supra* note 1 at 72. This sullied history makes it particularly important to use the redress process as an opportunity to improve relations with Aboriginal people and not to exacerbate their marginalisation.

52 David Wexler, "Therapeutic Jurisprudence" (2004-2005), Touro L. Rev. 353 at 357.

53 For example, see Ministry of the Attorney General, *Evaluation of the Grandview Agreement Process: Final Report*, by Deborah Leach (Ontario: Ministry of the Attorney General, 1997), Section 4.3.2: The Financial "Award" where it is noted that a substantial number of recipients found the financial award helpful for making positive changes in their lives, contributed to a sense of validation and gave them financial security and independence.

outcomes regardless of the amount of damages recovered, if any, but the level of satisfaction in this regard is not entirely clear. It is questionable whether most claimants would be willing to undertake litigation if they know that financial compensation would be minimal. This further underscores the importance of ensuring that claimants do not go away with a sense of disappointment and further victimisation.

The public nature of the litigation process may also provide therapeutic benefits for some victims. Plaintiffs are able to tell their stories publicly to the extent permitted by the litigation process, if they so choose. Public recognition of harm to survivors, in addition to monetary compensation, may be essential to satisfy victims' quest for justice,[54] and hopefully encourage adoption of preventative measures.[55] Most of the abuses took place in secret (within the walls of the institutions and in foster homes) and its existence was denied for so long, it is important for some victims that there be a public element to the redress process. As well, the public record created would educate the rest of society about abuses suffered by Aboriginal children in state care and how they continue to impact Aboriginal people individually and collectively.[56] This could create a climate that better supports affirmative action initiatives aimed at ameliorating some of the consequences of those experiences as well as improving Aboriginal and non-Aboriginal relations.

> All Canadians must be offered the opportunity to understand the destructive influence of the residential school system and to appreciate why the federal government is morally obliged to take significant steps to help survivors and their communities ... the impact of the abuse suffered by individual aboriginal children can only be understood when it is placed in its larger social context: families and communities have been profoundly harmed.[57]

Ultimately, the viability of the tort system as an avenue for redress depends on the ability of victims to feel that justice has been served in their case and that fair financial compensation has been recovered. It takes courage to initiate a lawsuit and to relive painful experiences and dark periods in one's life. It is equally brave for victims to expose themselves to what often amounts to aggressive defence tactics including discrediting survivors' testimonies, and attacking their reputation and credibility.[58] Expectations of fair financial

---

54 For the importance of public recognition and survivors' healing and sense of justice, see Herman, *supra* note 40, 70; See also Whyte, *supra* note 37 at 1-37.

55 *Supra* note 50 at 261.

56 *Restoring Dignity*, *supra* note 14 at 67.

57 *Ibid.* at 4, 53, 85. For IRS survivors, the opportunity to tell their stories and the educational benefit of public records may be achieved through the TRC process. However, there is no indication that other abuse survivors would have such a forum to tell their stories and/or for them to become part of the public record outside the judicial process.

58 For documentary evidence of stress and trauma expressed by survivors when they have to testify about their experiences of abuse, see Fred Kaufman, *Searching for Justice: An Independent Review of Nova Scotia's Response to Reports of Institutional Abuse* (Government of Nova Scotia, 2002), c. 1, section 7 "Effects of Abuse", online: <http://www.gov.ns.ca/just/kaufmanreport/chapter1.htm#1.7>.

compensation at the end of litigation to help offset some of the effects of abuse on victims' life are often substantial incentives for initiating suit. Costs associated with litigating historical claims can be prohibitive and can potentially expend large chunks of damage awards. Inequalities in financial and other resources between plaintiffs and institutional defendants further disadvantage claimants in effectively establishing their claims, losses and ultimately obtaining adequate compensation. Claimants often face the possibility or even probability of diminished awards.[59] Thus, principles that diminish feelings of satisfaction and limit the amount recoverable at the end of the day can undermine the desire to initiate tort claims.[60] Some claimants might be forced to accept non-judicial settlements although they do not feel fully satisfied with the process and/or outcome. Reluctance or unwillingness to initiate claims for fear of unsatisfying results acts to deprive plaintiffs of access to justice by denying them the opportunity to have their day in court or to pursue their claim in the forum of their choice. This is not withstanding the fact that, in theory, victims have a right to pursue their claims in the civil justice system. Such an outcome is unsatisfactory because it compromises claimants' rights and fails to provide any therapeutic value to victims.

V. GIVING CLAIMANTS CHOICE: IMPORTANCE OF PRESERVING THE TORTS AVENUE FOR VICTIMS

So far, this paper has been advocating for a flexible, sensitive and contextualised process for adjudicating institutional abuse claims by Aboriginal plaintiffs. Some might consider developments that encourage non-court based settlement processes as positive for claimants, the judicial system and society generally: the claimant would be saved the ordeal of going through trial and the possibility of disappointment at the end of the trial. In fact, the predominant view seems to be that litigation is not appropriate for these kinds of claims.[61] As well, non-judicial processes that take place away from the public view have sometimes been perceived as preferable and empowering as they afford survivors a safe venue to tell their stories to meet the general needs

---

59 For a discussion of the resource requirements of such claims as well as aggressive tactics on the part of defence lawyers to discredit or frustrate plaintiffs, see *supra* note 50 at 211-15, 240-6.

60 This was precisely the feelings expressed by the plaintiffs in the *Plint* case and the Aboriginal community generally in response to the low damages awarded to the successful claimants after having endured a lengthy trial and various examinations for discovery, testimony and cross-examination, which are often adversarial and hard on plaintiffs. See *ibid.* at 211, 218 (footnote 93 and accompanying text).

61 For example, a significant majority of Grandview survivors who participated in the Grandview Agreement process (88%) reported that they were satisfied with that process compared to civil litigation. Principal reasons for preferring the *Agreement* approach were the privacy of the Agreement, potential physical and psychological costs of civil litigation, delay associated with a court trial and going through the process as a group. See *Evaluation of the Grandview Agreement Process*, *supra* note 53, Section 4.5 – "The Grandview Approach Compared to a Civil Court trial" The Honourable Fred Kaufman also supports the establishment of the alternative dispute process in Nova Scotia for redressing institutional abuse for similar reasons. Kaufman Report, *supra* note 58, at c. 1, section 7 (Effects of Abuse). See also Jennifer Llewellyn, "Dealing with the Legacy of Native Residential School Abuse in Canada" (2002), 52 U.T.L.J. 253 at 261-76.

of victims and their communities.[62] The threshold for eligibility for compensation tends to be lower compared with civil suits, thereby improving the chances of many survivors to obtain compensation. For some claimants, non-judicial processes may be their only realistic avenue for redress.[63] Such processes are therefore more likely to enhance therapeutic benefits from seeking redress than civil suits. As well, the potential flood of litigation that threatens to overwhelm courts and society would have been avoided.[64] To a large extent, I share these views. However, is this necessarily the best for all survivors? This section of the paper highlights the importance of giving claimants a choice of forum to advance their claims and why an ADR process might not be satisfying to all claimants notwithstanding flaws in the litigation process.

Civil litigation may not be as empowering as it could be and is generally not perceived favourably by the public. It is nonetheless an important means of accountability.[65] It is not uncommon for parties providing compensation in non-court processes, who would have otherwise been defendants in tort actions, only to accept moral responsibility and yet to disclaim legal liability for the claim in question.[66] The extent of much touted therapeutic benefits from non-court processes is yet to be objectively verified.[67] An ADR process can be equally intrusive for claimants as court processes; allegations must be validated, although the ADR process is often held in private.[68] Some claimants have opted for litigation even in the face of government proposals for non-judicial settlements, among other things because they perceive the alternatives to be unfair.[69] Not everyone who has opted for an ADR settlement has been

---

62 See Institute for Human Resource Development (IHRD), *Review of the Needs of Victims of Institutional Abuse.* (Law Commission of Canada, 1998), Section 6.2, "Alternative Dispute Resolution." The *IRS Agreement in Principle* offers not only individual compensation but also funding for community-based healing initiatives and a possibility of eligible victims to receive personalized healing amount.

63 Both procedural and substantive rules, including technical defences such as limitation periods may be dispensed with in non-court processes. Claimants may be entitled to recovery even with less than probable evidence of a causal link between defendant's conduct and their loss. See *supra* note 50 at 264.

64 See generally Llewellyn, *supra* note 61.

65 *Supra* note 62, Section 6.3, "Civil Suits".

66 For example, *supra* note 5, Preamble, Para. H; the Memorandum of Understanding of Nova Scotia's response to institutional abuse specifically stated that neither the creation of the dispute resolution process nor award of compensation to survivors constitute admission of legal liability on the part of the government. Searching for Justice (the Kaufman Report), c. 7; Reconciliation Agreement – The Primary Victims of Father George Epoch and the Jesuit Fathers of Upper Canada (overview of Agreement), Kaufman Report, *supra* note 58 at 359.

67 The Grandview adjudicators note that references to the Agreement as a "healing package" may have created unrealistic expectations for some survivors as to how the process could have improved their lives, and warned against misleading survivors through the use of such language in future settlement initiatives. *Supra* note 53 at 6.3

68 Claimants may be required to produce very personal information such as medical records, be subjected to psychiatric or psychological examination as well as questioning by an adjudicator in order to have their claims validated.

69 For instance some survivors of Jericho Hill School opted out of the compensation because it was too narrow since it is limited to sexual abuse and launched a class action suit against the British Columbia government. Action has been certified but outcome is still pending. See *Rumley v. British Columbia*, [2001] 3 S.C.R. 184; *L.R. v. British Columbia* (2003), 12 B.C.L.R.

satisfied with the process and/or outcome. The outcome is often final with no opportunity for appeal or judicial review.[70] This could potentially be a problem under the *IRS Settlement Agreement* with respect to claims of sexual and physical abuse. Claimants who receive the CEP are bound to have their claims for physical and sexual abuses resolved through the IAP. There is no right of appeal from the Chief Adjudicator's decision regarding admitting a claim into the IAP. Claimants who receive the CEP would therefore hit a dead end if their experiences are found not to meet the threshold for the IAP process.

Claimants may have to make compromises which they would otherwise not make in court proceedings. The compromises may be made in return for concessions from defendants such as not raising the limitation defence, or not insisting on deductibility of benefits which claimants may have received or are yet to receive. There is often not much basis for comparison with other packages to determine the fairness of particular settlements. Some ADR processes have been criticized for not giving potential claimants sufficient information to make informed decisions about their participation. Another critique is the lack of transparency or consistency in applying the various matrices for determining appropriate levels of compensation.[71] Details of abuse, criteria for payment, and terms of settlement in individual cases are not disclosed, and could vary among claimants with comparable experiences.[72]

Some survivors may not feel public accountability has been achieved in the process, leading not only to concealment of abuse but also privatizing responsibility for it.[73] ADR processes for compensating victims of institutional abuse have sometimes been perceived by victims as intended to serve the interests of governments and other institutional defendants rather than to meet survivors' needs. These processes can be cost-effective for defendants (The Government saves the expense of defending actions and avoids potentially large damage awards if allegations are proven). The confidentiality

---

(4th), 121 (B.C.S.C.). Similarly the Alternative Dispute Resolution Process for former residential school students established by the federal government has been criticized as being limited in scope. See *supra* note 50 at 263-264.

70 The Grandview adjudicators note that although most survivors were satisfied with the decision others were intensely dissatisfied. Some saw it as specifically designed to be a cost-effective way for the government to compensate survivors. As well, adjudicators' decisions were final. *Supra* note 53 at section 4.2and section 5.1. For further criticisms of the Grandview Agreement, *supra* note 62 at 6.2 "Alternative Dispute Resolution" and "Non-Court Based Settlement Programs". The *IRS Agreement in Principle* also anticipates that some IRS survivors will opt out of the settlement process. See *supra* note 5 at 4.14

71 See *supra* note 62 at 5.1.5.

72 This concern does not arise in relation to the CEP under the Agreement in Principle because the formula for compensating all former students will be the same; $10,000 for attending IRS and $3,000 for each subsequent year at IRS. However, this might be an issue under the IAP in respect of validating the frequency and severity of various incidents of alleged abuses. *Supra* note 5, Schedule "D", "Compensation Rules".

73 One of the criticisms against the Grandview Agreement is that the terms are confidential and not accessible to members of the public. In lamenting this situation, the Institute for Human Resource Development notes that although abuse at the Grandview training school was a major and horrifying case, it remains relatively unknown in Ontario and much less in the rest of the country. Even the St. John's / St. Joseph settlement, which was intended to be publicly available as a permanent record of the abuse is now unavailable through the government. *Supra* note 62, Section 6.2 "Alternative Dispute Resolution".

surrounding these processes ensures that defendants can avoid or limit negative publicity about institutional abuse. Claimants are often required to sign waivers releasing the government from liability for their treatment at those institutions.[74] These have sometimes generated feelings of discontent among some survivors who perceive payments as intended to silence them. Such feelings diminish victims' sense of fairness, justice and satisfaction from both the process and outcome.

Settlement awards under ADR processes tend to be low compared to court-based awards and are capped, among other things, because of all the compromises the parties have to make.[75] Quantum of compensation is often determined by the nature and frequency of abuse and not necessarily the impact on the victim.[76] This is inconsistent with principles for assessing damages in tort where the focus of compensation is loss reasonably attributable to the defendant's conduct.[77] Notwithstanding its flaws, part of the appeal of the tort system is the potential to provide successful plaintiffs benefits that may not be attainable in an ADR process. This may include tangible benefits, for example, in the form of increased damages, and psychological benefits. For the most part, the former must exceed the latter to be worth pursuing tort claims.[78] More importantly, given the marginalized

---

74 For examples, see *supra* note 5, Schedule "D", Section III(a)(i), "Assessment Process Outline" - "Core Assumptions as to Legal and Compensation Standards"; Grandview Agreement; St. John's and St. Joseph's Agreement. Although the waiver of liability does not affect survivors' right of action against individual perpetrators, those people would often not be worth suing.

75 The differences in financial awards in the judicial and non-judicial processes can be quite substantial. For instance the Mt. Cashel survivors received awards of up to $400,000. The Grandview survivors received financial awards between $5,000 to $60,000 (the agreement provided for financial awards between $3,000 and $60,000). The average award in the Kingclear case, also another negotiated settlement, was $47,000. Notwithstanding the high rate of satisfaction among Grandview survivors who participated in the Agreement process, several of them felt they could have obtained higher financial compensation in a judicial process. *Supra* note 53, section 5.1: "The Agreement Approach". See also *Restoring Dignity, supra* note 14 at 80.

76 Compensation under the IAP is an exception as it goes beyond proven incidents of abuse in allocating points. Points are also allocated for aggravating factors and consequential harm resulting from abuses including short and long-term consequential loss of opportunity and income loss. However, the CEP is determined simply by years of attendance at an IRS.

77 There is a feeling among some survivors that determining levels of compensation based on nature of abuse or duration of forced attendance as in the context of the CEP under the IRS Agreement as opposed to impacts of that experience is a deliberate attempt by the government to limit liability while appearing to be objective. *Supra* note 62 at section 5.1.5. Terms of the IRS Agreement in Principle might fall into a similar trap. Though it is commendable for the government and church organizations to agree to compensate all former IRS students simply for having attended those schools, the scheme does not attempt to deal directly with the impact of forced attendance at IRS on the lives of students, for example by way of impaired working capacity or future care costs, if any, as would be the case in adjudication. I am, however, aware that this is part of the compromises to be made because not all eligible recipients could or would have been able to establish a cause of action in tort.

78 Civil suits may yield specific and general psychological benefits for claimants and others but it is unlikely to be the sole reason for initiating action. It takes a lot of courage on the part of abuse victims to initiate suit. As well, there are financial and emotional costs for bringing such actions. The need to testify means reliving those painful experiences, which could in turn prolong the healing process and also trigger the need for further therapy and costs to the plaintiff. Whereas it is hoped that civil suit will help survivors deal with their abuse, there is

socio-economic status of many Aboriginal people, it is not unreasonable for them to expect some personal financial gain if they are to proceed with the tort process, which inevitably takes a personal toll on victims. It is important for victims to feel they have been fairly treated in ways that recognize the broader context that gave rise to their victimization. A de-contextualized approach to these claims – an approach that limits the actionable issues and/or quantum of damages - undermines victims' sense of fairness and the availability of the tort process as a meaningful forum to seek redress. To avoid disappointment and re-victimization, some victims might simply choose the safer option, although it would not be satisfactory to them.

Civil actions provide a forum for public accountability for plaintiffs' victimization and for identifying those responsible for the horrific experiences of abuse. Media coverage generated by child abuse claims of these trials can also create public awareness of the horrors of institutional abuse and more generally out-of-home care programs.[79] Victims may derive therapeutic benefits from public processes. Further, damage awards are public records, and provide precedents for similar cases. Although a public process may be difficult for many survivors, some are willing to risk it not only for purposes of public education and accountability but also in the interests of justice.[80] Each claimant must be supported in their choice of forum to pursue their claim without feeling constrained by external forces. Given the vulnerability of survivors and feelings of powerlessness that have constructed their lives for so long, the ability to "freely" choose a forum for redress that meets their individual needs is necessary to promote healing and reconciliation. It also shows respect for their rights and needs, and promotes feelings of being in control over their lives.[81] This is particularly important for Aboriginal people, as they have historically been denied the right to determine their own destiny. Assumption about what is good for victims can be paternalistic, patronizing and a further source of marginalization, and must be avoided.

VI. LIMITING THE SCOPE OF INQUIRY

A. Separating Sexual and Non-Sexual Abuses

Many Aboriginal people have sought redress for childhood abuse in out-of-home care settings or programs ran by governments and other agencies. There

---

no empirical evidence of that yet. Claims of therapeutic benefits often come from claimants and/or their counsel but there is no objective verification of such claims and such pronouncements must be viewed with scepticism. See literature on therapeutic jurisprudence, notably Herman, *supra* note 40; Bruce Feldthusen, "The Civil Action for Sexual Battery: Therapeutic Jurisprudence?" (1993), 25 Ottawa L. Rev. 203, at 210-218; Feldthusen, et al, *supra* note 36.

79 Some of the benefits of public hearings such as creating a public record and the educational value of such records may be achieved through the Truth and Reconciliation process to be established under the IRS Settlement Agreement: *supra* note 5, Article 7. Laudable as this process may be, it may not offer survivors, their families and communities more than a safe and culturally appropriate forum to tell their stories. Such processes often dwell less on accountability and may not be satisfying for all concerned.

80 See Herman, *supra* note 40, 208-9; *Review of the Needs of Victims of Institutional Abuse, supra* note 62, Section 5.3.

81 See *Restoring Dignity, supra* note 14 at 65 – 66.

are no statistics on Aboriginal children victimized in government care other than former IRS students. It is estimated that there are about 80,000 former IRS students currently alive. A number of them have initiated claims of abuse against the federal government and churches that ran the institutions.[82] Plaintiffs often allege physical, sexual and emotional abuses while in the care of the defendants. Many of these claims are being pursued long after the alleged abuses occurred. Notwithstanding liberal interpretations of limitations provisions, claims governed by limitation periods are sometimes subject to ultimate limitation periods beyond which victims lose their right of action.[83] Defendants have successfully challenged these claims as being wholly or partly statute-barred.[84] Allegations of sexual misconduct are not subject to limitation periods[85] or have more generous limitation provisions in many jurisdictions.[86]

---

82 So far, over 15,000 former IRS students have filed claims against the federal government. About 64 percent of claimants have alleged sexual abuse while 93 percent have alleged physical abuse. "Statistics", Online: Indian Residential Schools Resolutions Canada <http://www.irsr-rqpi.gc.ca/english/statistics.html> (last accessed: Sept. 12, 2006).

83 Since the alleged abuses occurred while the plaintiffs were minors, limitation periods in relation to those abuses do not begin to run until they reach the age of majority. As well, claimants may benefit from the discoverability principle that also postpones the running of time until they become or ought reasonably have become aware of the harm at issue as attributable to the alleged wrongful conduct and the facts necessary to sustain a cause of action. The discoverability principle has been codified in limitation legislation in some jurisdictions. For examples, see *Limitation Act*, R.S.B.C. 1996, c. 266, s. 6; *Limitations Act*, S.O. 2002 c. 24, Sch. B, s. 10. However, postponement of the running of time based on discoverability is subject to an ultimate limitation period - 30 years in British Columbia (s. 8), 15 years in Ontario (s. 15), and 10 years in Alberta (*Limitations Act*, R.S.A. 2000 cL-12, s. 3(1) (b)), and Newfoundland in respect of personal injury and professional negligence claims (*Limitations Act*, S.N.L. 1995, c. L-16, s. 14(3)). For some of the complexities associated with the discoverability principles, see John Lee, "A New Uniform Limitations Act" 8-9, Online: Uniform Law Conference of Canada <http://www.ulcc.ca/en/poam2/CLS2004 New Uniform Limitations Act En.pdf> (last accessed: Sept. 12, 2006).

84 In some jurisdictions the ultimate limitation period applies to all claims based on childhood abuse and begins to run upon the claimant reaching the age of majority regardless of the discoverability principle. As such, many former IRS students and other children abused in out-of-home care programs can lose their right of action before they even become aware of their right of action. For example the Alberta *Limitations Act*, R.S.A. 2000, L-12, ss. 3, 5(2) do not exempt any cause of action from the ultimate limitation period. For examples of cases where defendants have successfully excluded non-sexual abuses from consideration because they are statute-barred, see *Blackwater v. Plint* (2003), 235 D.L.R. (4th) 60 at 91 (B.C.C.A), aff'd (2005), 258 D.L.R. (4th) 275 (S.C.C.); *K.L.B. v. British Columbia* [2003] 2 S.C.R. 403, 230 D.L.R. (4th) 513 at 536-538 (S.C.C.) [*K.L.B.*, cited to D.L.R.].

85 For examples see British Columbia, *Limitations Act*, R.S.B.C. 1996, c. 266, s. 3(4)(k) (l), Manitoba, *The Limitation of Actions Act*, C.C.S.M. c. L-150, s. 2.1(2)(a); Saskatchewan, *The Limitation of Actions Act*, S.S. 2004, c. L-16.1, s. 16(1)(a); Yukon, *Limitation of Actions Act*, R.S.Y. 2002, c. 139, s.2 (3)(a)(b).

86 In Nova Scotia, time does not begin to run for actions based on sexual abuse until the victim reasonably becomes aware of the harm resulting from the sexual abuse and a causal link between injury and sexual abuse. *Limitation of Actions Act*, R.S.N.S. 1989 c. 258, s. 2(5). Since there is no ultimate limitation period in the Nova Scotia legislation the right to initiate suit cannot be extinguished prior to the plaintiff discovering the right of action. Similarly, the Ontario legislation incorporates a discoverability principle in relation to assaults or sexual assaults; the 2-year basic limitation period and the 15-year ultimate limitation period will not run during any time when the claimant was incapable of bringing a suit due to physical, mental

The sexual assault exception may also arise in relation to sexual abuse in trust relationships.[87] Thus, claims of sexual assault are often allowed to proceed while the non-sexual aspects of plaintiffs' claims are routinely dismissed for being statute-barred.[88] An exception is recognized where sexual and non-sexual abuses are inter-related in the sense that the same defendant perpetrated both types of abuses as part of a common experience and the sexual abuse claim is not statute-barred.[89] Courts construe the combined physical and sexual assault exception restrictively to include only abuse that was part of the sexual assault or perpetrated by the same defendant. Physical and sexual abuses have not been considered integrated where both types of abuses occur in the same environment but by different perpetrators or where the sexual assault does not constitute a significant component of the plaintiff's claim. In *K.L.B.*, where the court found that the claim stemmed mostly from physical abuse in foster care with only one proven incident of sexual abuse, this was not considered sufficient to bring the claim within the sexual assault exception.[90] Defendants have also successfully argued for limiting compensation only to the effects of sexual abuse.

This approach is problematic. Separating sexual and non-sexual abuses that occurred contemporaneously as well as harm from those experiences, and prior and/or subsequent victimization is both complex and artificial. It attempts to separate what for all practical purposes was an integrated coercive experience of abuse and indivisible injury arising from the combined effects of sexual and non-sexual abuse. Even if physical acts of sexual and non-sexual abuses that occurred contemporaneously can be separated, the same cannot be said of the psychological effects of victimization. More importantly, victims perceive sexual and nonsexual abuses in the same setting as integrated, whether or not they were perpetrated by different defendants and at different times. The children perceived sexual and non-sexual assaults as part of the same coercive and abusive environment and colonial experience, which had stripped them of their dignity and self-esteem, leaving them at the mercy of staff members. As counsel for the plaintiffs in *B.G.* argued, sexual and non-sexual abuses were intertwined and the effects were indistinguishable for the victims.

---

or psychological conditions. *Limitations Act, 2002*, S.O. 2002 c. 24, Sched. B, s. 10 (1), s. 15(4). There is a rebuttable presumption of incapability in favour of the claimant in cases of sexual assault and assault where one of the parties to the case was in an intimate relationship with the plaintiff or was a person on whom the plaintiff depended. S. 10 (2) and (3); s. 15 (5).

87 For examples see Newfoundland and Ontario, where there is no limitation period in respect of claims arising from sexual assault or misconduct of a sexual nature that occurred in fiduciary relationships, relationships of care and authority or relationships of financial, emotional and physical dependency. *Limitations Act*, S.N.L. 1995, c. L-16, s. 8(2) (3); *Limitations Act 2002*, S.O. 2002, c. 24, Sched. B, s. 16(h).

88 For example, see *M.(M.) v. Roman Catholic Church of Canada* (2001), 205 D.L.R. (4th) 253; 160 Man. R. (2d) 265 (Man. C.A.), leave to appeal dismissed: [2002] S.C.C.A. No. 8 [*M.(M.)*]; *K.L.B., supra* note 84; *Blackwater v. Plint*; (2005) 258 D.L.R. (4th) 275 (S.C.C.) [*Plint*]; *Raubach v. Canada (Attorney General)* (2004), 185 Man. R. (2d) 195 (Man. Q.B); *supra* note 50 at 220.

89 See *K.L.B .v. British Columbia* (2001), 197 D.L.R. (4th) 431, 449-50, 87 B.C.L.R. (3d) 52 at 70, para. 48, per McKenzie J.A (B.C.C.A.), aff'd, *K.L.B. v. British Columbia*, [2003] 2 S.C.R. 403 [*K.L.B.*, cited to B.C.L.R.]; *B.G. v. British Columbia*, [2003] B.C.J. No. 3002, Paras. 57- 62 (B.C.S.C.) (QL), per Wong J. The integrated abuse exception is of no benefit to claimants in Ontario where the cause of action is extinguished by the ultimate limitation period.

90 *K.L.B., ibid.* at 71.

Both types of abuse contribute to a coercive environment filled with fear, leaving the victims vulnerable to further abuse. Plaintiffs should not be expected to differentiate between the effects of sexual and non-sexual abuse.[91] Realistically, they cannot, even if they would like to do so.

Attempts to limit defendant's liability based on a false divisibility of the effects of actionable and non-actionable traumatic factors fail to recognize that the effects of physical abuse could make a person susceptible to further abuse, sexual and/or non-sexual, at the hands of the same and/or other perpetrators and vice versa.[92] Thus, consequences of sexual abuse may include vulnerability to further abuse – emotional, physical and sexual. As well, non-sexual abuse, including the horrible conditions to which the students were exposed, may have aggravated their vulnerability to and impacts of sexual abuse.[93] The narrow construction of accepted parameters of inquiry detrimentally affects plaintiffs who were subjected to physical and occasionally sexual abuse by different perpetrators who wielded authority over claimants in those settings. Harms they suffered and their continuing effects on them are minimized with a corresponding lack of compensation for those harms even when defendants do not deny mistreatment of children in their care. Although sexual abuse is very traumatic and often results in long-term psychological consequences, the effects of the other forms of abuse have been equally damaging for victims, their families and communities.[94]

Limiting plaintiffs' claims to the consequences of the sexual abuse also presupposes that the effects of the sexual and non-sexual abuses are divisible or

---

91 *B.G. v. British Columbia*, [2003] B.C.J. No. 3002, at para. 63 (B.C.S.C.) (QL).

92 See Grace, *supra* note 43 at 191. In *E.D.G. v. Hammer* (1998), 53 B.C.L.R. (3d) 89 (B.C.S.C.) [*Hammer*], the trial court found that the plaintiff's sexual abuse by the defendant made her vulnerable to further abuse by others. "[The] subsequent abuse was a reaction and re-enactment of the initial sexual trauma." *Hammer*, *Ibid* at 103. Aff'd on appeal: *E.D.G. v. Hammer* [2003] 2 S.C.R. 459, 473 (Para. 33), 230 D.L.R. (4th) 554 at 564-5. See also *E.B. v. Order of Oblates*, [2001] B.C.J. No. 2700 (S.C.) [*E.B*] In *E.B.* Cohen J. refused to apportion damages between a Residential school staff member who had sexually assaulted the plaintiff over a four or five year period and an older student who had sexually abused him on one occasion because the staff's abuse had left the plaintiff vulnerable for further abuses by others. *E.B.*, *Ibid.* at paras. 295-298. Varied on appeal on other grounds: *E.B. v. Order of Oblates* (2005) 258 D.L.R. (4th) 385 (S.C.C.)

93 See *A. (T.W.N.) v. Clarke* (2001), 92 B.C.L.R. (3d) 250 at 300-01 (B.C.S.C.), where Williamson J. found that the plaintiffs' vulnerability as children living away from their families and communities, the general authoritative and coercive environment at the school, the trust and authoritative relationship between the children and defendants all facilitated the sexual abuses. These factors justified an award of aggravated damages to each of the four plaintiffs. Varied on appeal on other grounds: *T.W.N.A. v. Clarke* (2003), 22 B.C.L.R. (4th) 1, 235 D.L.R. (4th) 13 (B.C.C.A.). Under the IRS Agreement former students will be entitled to a Common Experience Payment for attending IRS. Eligible former students, who have already settled their claims either through an ADR or litigation, will still be entitled to the CEP. However, it remains unclear whether those who choose litigation after the agreement has entered into force will still be entitled to the CEP given the fact that receipt of the CEP releases the federal government and the churches from further liability, except claims for serious physical and sexual abuses, which must be pursued before the IAP.

94 For instance, the Law Commission of Canada has recognized that the loss of language and culture has had a lasting effect on former students and Aboriginal communities in the form of psychological disorientation and spiritual crisis among Aboriginal children. *Restoring Dignity*, *supra* note 14 at 61.

that they are independent tortious causes and consequences. Given the overlap between sexual and non-sexual abuses, division between the effects is complex and almost impossible in most cases. Sexual and non-sexual abuses should be considered concurrent causes of plaintiffs' injuries. According to Justice Major in *Athey v. Leonati*, a defendant cannot be excused from liability simply because other factors for which he/she is not responsible have contributed to the plaintiff's injury.[95] Thus, where the plaintiff's injuries from sexual and non-sexual abuses are considered indivisible the boundaries of the inquiry cannot be limited to the consequences of the sexual abuse. The contribution of the different causal factors to the plaintiff's injuries will be considered in assessing damages through apportionment, where possible, with the defendant being responsible for the proportion of the injuries attributable to his/her tortious conduct.[96] However, the plaintiff will still be able to recover the entire judgment from the defendant pursuant to the principle of joint and several liability, leaving the defendant to seek contribution from the other tortfeasors.[97]

Although the burden of proving causation rests with the plaintiff, the onus of proving that the plaintiff's injury is divisible should be on the defendant, especially where sexual and non-sexual abuses were committed simultaneously. Courts should start from a presumption that even if not solely responsible for the plaintiff's injuries, proven sexual abuse significantly contributed to the plaintiff's loss.[98] As well, there should be a presumption that the consequences of sexual and non-sexual abuse are indivisible. Shifting the burden of proof onto defendants is justifiable on several grounds. It is unfair for a plaintiff to be prejudiced because the defendant's wrong has combined with other factors to complicate the apportionment of responsibility. Since the defendant's wrong has made it impossible to ascertain the effects of various factors on the plaintiff's situation, it is not unreasonable to place the burden of sorting out the effects of the various causal factors on the defendant.[99] This plaintiff favourable approach would be consistent with the need for healing and reconciliation particularly in the context of abuses at IRS and other out-of home care programs and the government's role in placing the children in harms' way. It must be noted, however, that this plaintiff-favourable approach constitutes a circumvention of the limitation defence (to be fully explored below). The plaintiff gets the same result as if no aspect of the claim were time barred, leaving the defendant to theoretically seek contribution from the other tortfeasors. The issue of contribution becomes moot where the same defendant, usually the government and/or a church, would have been responsible for the non-sexual abuse either directly or vicariously, as is the case in many of the institutional abuse claims. It is questionable whether the same

---

95 [1996] 3 S.C.R. 458, 467-68 (Paras. 17 - 20) [*Athey*].

96 See *T.W.N.A. v. Clarke* (2003), 22 B.C.L.R. (4th) 1, 235 D.L.R. (4th) 13, 23 (Paras. 22-23) (B.C.C.A.) [*Clarke* cited to D.L.R.]; *Athey, Ibid.* at 469 (Para. 22).

97 See *Negligence Act*, R.S.B.C. 1996, c. 333, s. 4; *R (G.B.) v. Hollett* (1996), 139 D.L.R. (4th) 260 (N.S.C.A.), leave to appeal and cross-appeal denied, [1996] S.C.C.A. No. 541 (Q.L.).

98 See Elizabeth Grace & Susan Vella, *Civil Liability for Sexual Abuse and Violence in Canada* (Toronto: Butterworths, 2000), 191. See also the Court's reasoning on causation in *Walker Estate v. York-Finch General Hospital*, [2001] S.C.J. No. 24 (Q.L.).

99 See similar reasoning in *Cook v. Lewis*, [1951] S.C.R. 830.

result should prevail where different tortfeasors are responsible for sexual and non-sexual abuses. A claim for contribution should be possible where non-sexual abuse is not disputed, and the plaintiff could have successfully sued in respect of those abuses but the claim is no longer actionable by reason of a special defence, such as being statute-barred.[100] To avoid this outcome it is likely that, whenever possible, courts would not consider the effects of sexual and non-sexual abuse to be indivisible.[101]

Separating experiences and effects of sexual and non-sexual abuses and limiting liability only in respect of the former leaves plaintiffs with limited remedies. The opportunity for and effects of sexual and non-sexual victimization are indistinguishable from the victims' perspective. Excluding the non-sexual abuse from the scope of plaintiffs' actions against the defendants is unfair. The partial victory compromises therapeutic benefits plaintiffs may derive from successful suits. This constitutes bad faith on the part of defendants who would have been responsible for all the abuses but for the special defence. It is also inconsistent with therapeutic jurisprudence.[102] As the Law Commission of Canada has noted, providing effective redress for abuse inflicted on survivors requires empathy and an understanding of those

---

100 See *Bill Thompson Transport Inc. v. Scarborough (City of)* (1993), 14 M.P.L.R. (2d) 278; [1993] O.J. No. 506 (Gen. Div); Lewis N. Klar, *Tort Law*, 3rd ed., (Toronto: Thomson Carswell, 2003), 496-99; Elizabeth Pedersen Lewis, "Third Party Liability for Contribution and Indemnity – The Slings and Arrows of Outrageous Circumstances" (1992) 10 Can. J. Ins. L. 33; Kutner, Contribution among Tortfeasors" (1985), 63 Can. Bar Rev. 1 at 8-10.

101 The court adopted such an approach in *Hammer*. The court recognized that the defendant's sexual abuse rendered the plaintiff vulnerable to further abuse and that there was an overlap between the effects of the defendant's abuse and that of the other tortfeasors. Though recognising that most of the plaintiff's injuries (90 percent) were caused by both the defendant and the other tortfeasors and therefore indivisible, it still concluded that about 10 percent of her injuries were solely attributable to the subsequent abuse. While the defendant was liable for the entire 90 percent (on the basis of joint and several liability under the BC *Negligence Act*, R.S.B.C. 1996, c. 333, section 4), 10 percent of her damage could not be attributable to him: *E.D.G. v. Hammer* (1998), 53 B.C.L.R. (3d) 89, 102-3 (B.C.S.C.), Aff'd: *E.D.G. v. Hammer* [2003] 2 S.C.R. 459, (2002) 230 D.L.R. (4th) 554 at 564-5.

102 *Muir v. The Queen in right of Alberta* (1996), 132 D.L.R. (4th) 695 (Alta. Q.B.), provides an important comparison to the limitation defence in the sexual abuse cases. In Muir, the plaintiff was confined at a training school or more appropriately an institution for persons deemed to be mentally defectives and sterilized without her consent or knowledge as part of the eugenics movement. She sued the Alberta government for having authorized the confinement and sterilization. Although the government thought the claim was statute-barred the government felt the right thing to do in the circumstances and to truly show remorse for what had happened to the plaintiff and others similarly situated was to allow the claim to proceed without raising the limitation defence. In return, the plaintiff agreed not to seek punitive damages in that case but was still able to recover substantial damages for her claim and also felt some sense of satisfaction that someone had been held accountable for the physical and emotional abuse she has suffered. This was supposed to be an act of good faith. Although making the plaintiff agree not to claim punitive damages was problematic given the horrible experience she had endured, the decision can still serve as an example in the historical abuse cases in terms of how defendants should conduct such cases in ways that acknowledge the consequences of government intervention on victims' lives. It is important to note that the Muir case was not isolated. Other victims who had been through the training schools were also suing the government or at least negotiating settlements. Thus, there were potentially more claimants and the Muir case could be seen as a test case to be followed in the subsequent cases but this did not deter the Alberta government from doing the right thing.

experiences from the children's perspective.[103] Insisting on narrow constructions of legal issues undermines the trust and confidence that claimants might otherwise have in the government's stated desire to promote healing, reconciliation and earn the trust of Aboriginal people. The case for recognising sexual and non-sexual abuse as integrated is further justified in light of the root causes of institutionalization and/or abuse, as premised on notions of racial inferiority of Aboriginal people and the general vulnerability of children in out-of-home care settings. Such an approach is consistent with *Charter* [104] values to avoid discriminatory effect of laws on groups marginalized, for instance, on the basis of race.

B. De-contextualized Construction of Claimants' Original Position: Causation and Assessment of Damages

An important goal of tort liability is to provide compensation for plaintiffs.[105] This is true even for proponents of corrective justice who assert that tort claims have no instrumental value other than restoring the disturbed equilibrium between the parties. To the extent that tortious conduct impacts plaintiffs' holdings by impairing their ability to meaningfully engage in productive work or lead full lives, financial compensation is morally justified as necessary to restore plaintiffs to their *status quo ante.*[106] The tort system is by no means a perfect mechanism for compensating victims of personal injuries. Some issues are unsuitable or difficult for tort litigation. Only persons who can successfully satisfy the legal requirements for liability are entitled to be compensated.[107] However, successfully navigating the liability phase is no guarantee that the plaintiff can expect justice or feelings of satisfaction at the remedial stage. Civil litigation is an expensive process for individual litigants (financial and emotional) and the state as well. There should therefore be good reason for invoking such expensive machinery. In addition to establishing liability for a particular injury, benefits that plaintiffs obtain from successful suit in the form of monetary compensation for their tangible and intangible losses is one such good reason for setting the judicial machinery in motion.

A defendant's negligence need not be the sole cause of the plaintiff's injury. A causal link between sexual abuse and the injury in question may be

---

103 *Restoring Dignity*, *supra* note 14 at 41. See also Jane Wangmann, "Vicarious Liability for Institutional Child Sexual Assault: Where does Lepore Leave Australia?" (2004) 28 Melbourne U.L. Rev. 109 (Westlaw).

104 *Canadian Charter of Rights and Freedoms*, Part 1 of *the Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11. Section 15 of the *Charter* prohibits discriminatory effects of law on the basis of, *inter alia*, race, Although the *Charter* has no direct application in private litigation based on the common law, courts are mandated to interpret and apply the common law in ways consistent with the fundamental values underlying the *Charter*. See *R.W.D.S.U., Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573.

105 See John Fleming, *The Law of Torts*, 9th ed. (Sydney: LBC Information Services, 1998) at 5.

106 For example, see Stephen R. Perry, "Loss, Agency, and Responsibility for Outcomes: Three Conceptions of Corrective Justice" in Ken Cooper-Stephenson & Elaine Gibson eds., *Tort Theory* (North York: Captus University Publications, 1993), 24 at 38-9.

107 For example, see Terence G. Ison, *The Forensic Lottery* (London: Staples Press, 1967); Christopher H. Schroeder, "Causation, Compensation and Moral Responsibility" in David G. Owen, ed., *Philosophical Foundations of Tort Law* (Oxford: Clarendon Press, 1995) at 347; Allen M. Linden & Bruce Feldthusen, *Canadian Tort Law*, 8th ed. (Markham, Ontario: Butterworths, 2006) at 4.

established notwithstanding the existence of other factors in the plaintiff's life that made him/her vulnerable to suffering the same or similar injuries or that may have exacerbated his/her injuries.[108] The thin skull principle only gets plaintiffs over the causation bar; successfully establishing causation against a defendant is no guarantee for receiving full compensation for plaintiff's losses. A plaintiff's entitlement is determined not by the rules of liability, or causation in particular, but by principles relating to the assessment of damages.[109] *Restitutio in integrum* mandates that a plaintiff is to be restored, in monetary terms, to their original position, that is, the same position they would have occupied but for the injury. A corollary of this principle is that a claimant is not to profit from their victimization and hence is not entitled to be restored to a better position than their *status quo ante*.[110] Other factors that have contributed to the plaintiff's current situation not attributable to the defendant's wrong cannot be ignored in the assessment of damages recoverable from the tortfeasor. A plaintiff is therefore not entitled to recover more than what is perceived to be her or his actual losses from the defendant's wrongdoing. A plaintiff is also not entitled to recover losses they would have incurred in any case even if he or she had not been victimised by the defendant's wrongdoing. In such cases, the defendant's wrongdoing is not considered a "but for" cause of the plaintiff's losses.[111]

Theoretically, plaintiffs are entitled to be compensated only for the consequences of the defendant's wrongful conduct. This requires construction of the so called original position - what the plaintiff's life would have been absent the wrongdoer's intervention in her or his life. What constitutes the plaintiff's original position absent the defendant's tort may not always be entirely clear, especially because this position was never realized and may be impossible to even imagine due to the defendant's intervention in the plaintiff's life at an early age. The inquiry into the plaintiff's original position is therefore speculative. Even if ascertainable, it is sometimes not clear what

---

108 See *Athey, supra* note 95 at 467 (Para. 17) and 473 (Para. 34). Causation of injury and plaintiff's losses are established based on balance of probabilities that the defendant's conduct caused *or contributed* to the injury in question. A defendant may therefore be held liable for the plaintiff's injuries although those injuries may have been aggravated by the plaintiff's pre-existing disposition or unrelated intervening events (thin skull).

109 See *Plint, supra* note 88 at 296 (Para. 78), where the Court affirmed the distinction between the rules on causation and assessment of damages.

110 See *Ratych v. Bloomer*, [1990] 1 S.C.R. 940 at 962-64, at Para. 44 - 48, per McLachlin J. (as she then was); *Athey, supra* note 95 at 472, (Para. 32). In *Athey*, Justice Major stated that a defendant's liability should be limited to injuries caused or contributed to by his/her wrong. It is irrelevant that other non-tortious causes contributed to the plaintiff's injuries (*supra* note 95 at Para. 12 & 17 - 20). He also emphasized that a plaintiff is only entitled to be restored to her original position. Thus, while a defendant is liable to fully compensate the plaintiff even where there are other non-tortious contributing factors to the injury in question this would not be so where the plaintiff would have suffered some or all of those injuries anyway even absent the defendant's wrong (*supra* note 95 at paras. 32, 34-35). See also *Mizzi v. Hopkins et al.* (2003) 64 O.R. 365 para. 27 (C.A.).

111 The financial consequences for injuring a thin-skull plaintiff are less than those recoverable for injury to those with no such inherent susceptibilities in their original position because the pre-existing vulnerability reduces the value of the interest impaired by the defendant's wrong. Linden & Feldthusen, *supra* note 107 at 385 - 386; Joseph H. King, "Causation, Valuation, and Chance in Personal Injury Torts Involving Pre-existing Conditions and Future Consequences" (1981) 90 Yale L.J. 1353 at 1359.

should be considered the plaintiff's original position where several events, including the defendant's tortious conduct, have combined to produce the plaintiff's current condition.[112] Constructing a plaintiff's original position is also complicated where several factors have combined with the defendant's wrongdoing to produce the harm in question, and some of those other events are not actionable (either because they are non-tortious or statute-barred). This is typically the situation of many Aboriginal victims of historical and institutional abuses. Even when the psychological impact of sexual abuse is not disputed, plaintiffs could still be denied compensation for income loss for failure to prove that any impairment was due to the impact of abuse where other events may have contributed to plaintiff's condition.[113]

Claimants unable to pursue the non-sexual aspects of their claims and/or suffered other non-tortious traumatic experiences before and/or after the wrongdoing in issue are only entitled to damages reflecting the effects of sexual abuse on their lives. Their original position is to be constructed by reference to their condition immediately before the sexual abuse. Subsequent events that

---

112 In *M. (M.) v. F. (R.)*, the plaintiff was sexually abused by the son of her foster mother. The abuse continued for about a period of about 9 years, until her removal to another foster home when the abuse became known. The plaintiff had a grade nine education. In assessing her past loss of income the trial judge assumed that she would have been at the bottom end of the wage scale even absent the defendant's abuse. Ultimately the trial judge did not make any award for past income loss, because among other things plaintiff had benefited from social assistance, which was to be set off from any award and also that any employment income would have been low. In reversing this decision, Donald J.A. noted that by fixing her past loss of income at the bottom end of the wage scale, the trial judge relied on the plaintiff's actual educational level. He said that this was inappropriate because it ignored the fact that the plaintiff's emotional difficulties, which were mostly attributable to the defendant's abuse, were the reason she dropped out of school. This is an important factor to be considered in constructing the income level that the plaintiff would have attained but for the defendant's abuse. To assess the plaintiff's loss based on her actual educational level essentially allowed the tortfeasor to benefit from his wrongdoing. *(M. (M.) v. F. (R.)* (1999), 52 B.C.L.R. (3d) 127 at 151 (B.C.C.A.).

113 For example, see *Blackwater* v. *Plint* (2001) 93 B.C.L.R. (3d) 228 (B.C.S.C.) (regarding P.D.S. and M.W. 2, *Ibid* at 354 (Paras. 765-767) 377 (Para. 922)), aff'd on appeal, *Blackwater v. Plint* (2003) 21 B.C.L.R. (4th) 1 at 65-6 (Paras. 225-227) (B.C.C.A). See also *H.L. v. Canada*, [2005] 1 S.C.R. 401 [*H.L.*] where the plaintiff did not adduce expert evidence regarding his past and future income loss due to the abuse. The trial court awarded some amount for this head of damage but noted that the amount could have been higher if the plaintiff had provided better evidence of this loss. The Saskatchewan Court of Appeal set aside the awards for past and future income loss for lack of evidentiary foundation but the majority of the Supreme Court of Canada (Bastarache J. dissenting) restored the award for past income loss. Fish J. for the majority was satisfied with the evidence of the causal link between the sexual abuse of H.L and his past loss of earnings but not in relation to his future losses. *H.L., ibid.* at para. 133, 152. See also *D.W. v. Canada (AG)*, where Maurice J. declined to award damages for future loss of earning capacity because the plaintiff had failed to establish a real and substantial risk of such loss in light of his ongoing disorders. *D.W. v. Canada* (1999) 187 Sask. R. 21 at para. 40 (Q.B.) [*D.W.*]. In *M. (C.) v. Canada*, [2004] S.J. No. 290, at para. 75 (Sask. C.A.), the court did not object to the plaintiff's abandonment of her claim for past and future loss of income for lack of or inadequate evidence to support the claim. For a discussion of some of the evidentiary difficulties faced by survivors of institutional abuse in establishing their losses, see *supra* note 50 at 214-19, 253. Institutional abuse claimants face difficulties in satisfying the evidentiary burden of establishing a causal connection between abuse and their loss of income resulting in lower awards for damages or none. Ironically, there also appears to be unjustifiably higher expectations that Aboriginal claimants will recover from psychological disorders that impair their employability. This is a further source of under-compensation.

have detrimentally affected the plaintiff's life are also to be considered in determining the effects of the defendant's wrong and hence the quantum of damages.[114] This is a difficult task because sexual abuse is often not an isolated incident. In fact, sexual abuse is often perpetrated over a period of time in tandem with other abuses that are statute barred and with the entire out-of-home care experience. Insistence on identifying plaintiffs' original positions absent the sexual abuse, assumes that the injury from that incident can be isolated from the non-sexual abuses, which for the most part is impossible. Given the inter-related nature of the psychological effects of those experiences and the fact that the impugned conduct occurred many years ago, it is almost impossible to accurately determine the so-called original position to justify low damages on the basis of a crumbling skull.[115] In *Athey*, the Supreme Court of Canada noted that a defendant whose tortious conduct was a necessary factor in causing the plaintiff's injury would be liable for the entire loss even if the wrongful conduct played a minor role in the eventual injury. No reduction of damages is permitted to reflect the existence of non-tortious background causal factors. The result will be the same where the defendant's tortious conduct and the plaintiff's pre-existing condition were sufficient causes and it is determined that the defendant's wrong significantly contributed to the plaintiff's injury on a balance of probabilities.[116] These principles should similarly be applicable to concurrent and subsequent causes where the defendant's wrongful conduct exceeds the *de minimis* range.

A plaintiff's entitlement to damages for impaired working capacity is determined by what is considered to be the worth of her or his human capital in the capitalist market given her or his so- called original position. The plaintiff's predisposition to the same or similar losses is therefore reflected in the assessment of damages for impaired working capacity in one of two ways: (a) through valuation of the interest impaired; or (b) through a discount. In the context of claims by plaintiffs from marginalized groups such as Aboriginal

---

114 *Clarke, supra* note 96, at para. 49. In *Clarke*, the B.C.C.A. unequivocally overruled *M (M.) v. F. (R.)* (1997), 52 B.C.L.R. (3d) 127 (C.A.), an earlier authority in which the Court of Appeal had refused to apply proportionate liability by disregarding the presence of non-tortious factors in the plaintiff's life that made her susceptible to the injury in question, which was triggered by the sexual abuse she suffered. Smith J.A. noted that the error in that case stemmed from a conflation of the principles on causation and those relevant for the assessment of damages and the view that proportionate liability is appropriate only when the pre-existing condition was active at the time of the defendant's wrongdoing. Smith J.A. emphasized that the relevant consideration for the application of proportionate liability is the likelihood of the non-tortious condition detrimentally affecting the plaintiff in the future and not limited to situations where that condition is already manifest and disabling at the time of defendant's wrong. *Clarke, supra* note 93 at paras. 39-78. See also *A.. (M.) v. Canada (A..G.)* (2003), 224 D.L.R. (4th) 688 at paras. 26-9 (Sask. C.A.) [*A. (M.)*]; *M. (C.) v. Canada (A.G.)* (2004) 248 Sask. R. 1 (Sask. C.A.). The Supreme Court of Canada implicitly approved of the "crumbling skull" approach in the assessment of damages in *M.B. v. British Columbia* [2003] 2 S.C.R. 477 at paras. 52-54 where McLachlin C.J.C. affirmed the trial judge's apportionment between the plaintiff's biological and foster fathers in causing her emotional difficulties.

115 In *Plint*, Brenner C.J.S.C. recognized the difficulties in assessing causation in historical abuse cases: *Supra* note 113 at para. 365, 373. The Supreme Court of Canada affirmed this view, noting that it is virtually impossible to separate the effects of contemporaneous sexual and non-sexual abuse and prior trauma that have combined to produce the plaintiff's injury. *Plint, supra* note 88 at para. 74.

116 *Athey, supra* note 95 at para. 41.

people and other visible minorities, courts routinely assume that individuals from those communities would not have achieved a higher socio-economic status even absent the abuse in question because of their marginalization status. This results in lower damages for impaired working capacity.[117]

Reference to the material conditions of Aboriginal people in constructing claimants' so-called original position and hence in determining their entitlement to damages is problematic. Many of the claims under review in this paper stem from the colonization and forced assimilation of Aboriginal people. Ignoring the historical antecedents for these claims and the current marginalization of Aboriginal people perpetuates discrimination against them. It also undervalues the human potential of Aboriginal people. Further, it is not a realistic reflection of what the original position of survivors would have been, had they not been abused. Instead of resorting to the so-called original position in assessing damages (which is inherently discriminatory in cases of historical abuse victims and other marginalized groups generally), a better comparator group should be non-Aboriginal, mainstream Canadians. The Canadian government contributed to compromising the material conditions and hence the so-called original position of Aboriginal people. It should therefore not be permitted to rely on their current material conditions as the relevant point of reference in assessing what their original position would have been absent the wrongdoing that they suffered while in government care.

C. Contingency Deductions

Assessment of damages must reflect the chances of risks inherent in the plaintiff's so-called original position materializing regardless of the actionable wrong. Damages may be reduced to reflect that contingency.[118] However, existence of necessary preconditions inherent in the plaintiff's original position does not justify reduction in damages absent evidence of a realistic chance that the plaintiff might suffer the same or similar injury at some point even without the defendant's tort.[119]A discount presupposes that the plaintiff's original position as well as the effects of the defendant's tort on the plaintiff's life can be ascertained with reasonable certainty. The preconditions for discounting damages are difficult to prove where the plaintiff has suffered a single indivisible injury attributable both to the defendant's tort and other factors.[120] While liability for injuries cannot be apportioned between tortious and non-tortious causes, *restitutio in integrum* dictates that damages should be discounted to reflect the chances that the plaintiff might have suffered the loss in question at some point even absent the defendant's wrongdoing (crumbling skull). The defendant's liability is limited to any additional damage or acceleration of the injury due to her or his wrongful conduct, if any. In *Smith*

---

117 For examples, see *Ross (Guardian ad lLitem of) v. Watts*, [1997] B.C.J. No. 1998 paras. 257-58 (S.C.) (Q.L.); *D.W.*, *supra* note 113 at paras. 38-39; Adjin-Tettey, *supra* note 44 at 334; *supra* note 50 at 251.

118 See *Athey, supra* note 95 at para. 35); *Schrump v. Koot* (1977) 82 D.L.R. (3d) 553 at 559 (Ont. C.A.); *Graham v. Rourke* (1990) 74 D.L.R. 1 at 15 (Ont. C.A.); *H.L. v. Canada (A.G.)* (2003), 227 Sask. R. 165 at paras. 236-237) (Sask. C.A.); *D.W. supra* note 113 at paras 38-39.

119 *Athey, supra* note 95 at para. 48; *H.L. supra* note 113 at para. 28.

120 See *H..L. supra* note 113 at para. 28, Fish J.

v. Leech Brain,[121] the plaintiff's husband suffered a burnt lip while working due to his employer's negligence. The burn resulted in cancer of pre-malignant tissues and ultimately caused the husband's death three years later. In an action for the wrongful death of her husband, the plaintiff's damages were reduced to reflect the likelihood that the deceased might have developed cancer even if he had not suffered the burn. *Smith* may be contrasted with *Athey*, where the plaintiff had a pre-existing back condition and subsequently suffered a disc herniation due to the defendants' wrongdoing. The Supreme Court of Canada did not apply proportionate liability because, although the pre-existing condition made the plaintiff vulnerable to suffering a back injury, there was no measurable risk of him sustaining that injury absent the defendants' negligence.

It is not uncommon for courts to discount damages for Aboriginal claimants on the basis of the crumbling skull principle. The rationale is that, given their often difficult family circumstances before and/or after the abuse in issue, their original position was already compromised regardless of the defendant's wrongdoing. Hence, the victims were predisposed to experiencing some of the harms allegedly attributable to defendant's wrongdoing.[122] These background factors could be perceived as increasing victims' vulnerability to abuse, and in some cases complicating the resulting harm from the defendant's wrongdoing. Rather, pre-existing vulnerability tends to be perceived as independent causal factors resulting in separate non-tortious injuries distinct from the consequences of the defendant's wrongdoing.[123] This can have differential impacts on many Aboriginal claimants due to the effects of years of colonization and forced assimilation on the lives of many Aboriginal people. They have a disproportionately higher incidence of social dysfunction in their families and communities, and are also marginalized socio-economically.[124]

Application of the crumbling skull to reduce damages is justifiable only when supported by strong evidence and not discriminatory assumptions about the conditions of Aboriginal people.[125] In *H.L.*, the majority of the Supreme Court of Canada affirmed that notwithstanding H.L.'s vulnerabilities from

---

121 *Smith v. Leech Brain*, [1962] 2 Q.B. 405 at 416. In *M.B.*, the Supreme Court of Canada affirmed deductibility to reflect pre-existing vulnerabilities, although it reversed the B.C. Court of Appeal's reduction of damages to take account of the effects of abuse inflicted by M.B.'s biological father prior to placement in foster care and the foster father's abuse because there was no basis for concluding that the trial judge had not already taken account of that in arriving at the appropriate quantum of damages. *M.B.*, *supra* note 114 at 500 (Paras. 52-54).

122 For example see *Plint*, *supra* note 88 at para. 82; *H.L. supra* note 113 at paras. 337-339, Bastarache J., dissenting.

123 See *supra* note 43 at 188-189

124 Aboriginal claimants are particularly affected by these contingency deductions especially in the assessment of past and future impaired earning ability because they tend to have "significantly higher rates of social and personal dysfunction" compared to non-Aboriginals. Diane Rowe, "Race, Culture and Gender Considerations: Contingent Factors and Damage Awards for Sexual Assault and Abuse" (Toronto: The Canadian Institute, 2001).Online: http://72.14.253.104/search?q=cache:qZrCp0Hw9UoJ:www.wob.nf.ca/news/2001/race,%2520culture,%2520gender.htm+Diane+Rowe&hl=en&gl=ca&ct=clnk&cd=1&client=firefox-a

125 In *K.L.B.*, the Supreme Court of Canada cautioned against constructing the original position based on assumptions of effects of dysfunctional and poor family background: *K.L.B.*, *supra* note 84 at paras. 60-61.

growing up in a dysfunctional home, the injury complained of could not be attributable to plaintiff's pre-existing condition because there was no evidence that he would have suffered the injury in question regardless of the defendant's abuse.[126] In such cases, although the defendant's wrongdoing is not the sole cause of plaintiff's injury, the defendant is nevertheless held fully responsible on the basis that their wrong significantly contributed to the plaintiff's condition. The same conclusion has been reached even where the plaintiff's condition involved the combined effects of the defendant's wrongdoing, the plaintiff's pre-existing susceptibility and subsequent tortious conduct.[127] This analysis should be applied to all historical abuse cases where the defendants are implicated in creating plaintiff's allegedly unfavourable original position.

The argument in favour of reducing damages to reflect risks of injury inherent in the plaintiff's pre- and post-tort situation is more plausible in relation to discrete events where the defendant is a stranger (in a legal and practical sense) in the plaintiff's life as, for example parties in many motor vehicle accidents. Although the nature of the plaintiff's future, absent the injury, can never be known, we can at least identify how the incident has altered the plaintiff's life and we can make projections of its effects on her/his future, however imperfect. This task is very difficult where the impugned conduct takes place over a period of time and interacts with other culpable and non-culpable factors. Also, the narrow focus on the plaintiff's so called original position just before the tort ignores the government's role in bringing the children to the institutions in the first place, and renders the non-sexual abuses invisible. It also implicitly 'rewards' those who prey on, and exploit vulnerable persons, especially children, while minimising the perpetrators' responsibility for such reprehensible conduct.[128]

D. Determining Quantum of Damages: What is Included and what is Excluded

As the preceding discussion shows, Aboriginal victims of institutional and historical abuses are disadvantaged in the assignment of responsibility for their losses. A further disadvantage may be evidenced in the quantum of damages they recover for the effects of abuse on their lives. There is a tendency for courts not to award loss of future income where cost of therapy is awarded or where there is evidence that the plaintiff is receiving treatment. Courts recognise that the abuse has detrimentally affected the plaintiff such that s/he requires treatment and that this condition has also affected their earning potential in the past. Yet, the courts are reluctant to recognise the potential of

---

126 *H.L. supra* note 113 at para. 28 - 30. See also *D. (P.A.) v. H. (A.E.)* (1998), 49 B.C.L.R. (3d) 340 (B.C.S.C.), where the court found that although the plaintiff exhibited some of the alleged detrimental consequences of sexual abuse by her father prior to the abuse in issue, there was evidence that she could have overcome them. The father was held fully liable for all her losses because she would not have suffered those effects but for her father's abuse. On the other hand, in *York v. Johnson* (1997), 37 B.C.L.R. (3d) 235 (C.A.), an accidental injury caused a relapse of a condition that had been in remission for 16 years. The court attributed causation to the defendant's wrongdoing but reduced damages to reflect the risk of relapse inherent in plaintiff's pre-accident condition.

127 See *Alderson v. Callaghan* (1998) 40 O.R. (3d) 136 at 139 (Ont. C.A.).

128 See *supra* note 43 at 214.

the effects of abuse affecting their income potential in the future.[129] This is justified on the basis of lack of evidence of the continuing effects of abuse on plaintiff's earning potential.[130] Among other things, this is intended to avoid pathologizing survivors. In *H.L.* the Court reasoned that it is a disincentive to claimants, whose earning potential has been impacted by emotional and substance abuse in the past, to assume that their condition will not improve and the effects of abuse on their earning capacity will continue indefinitely.[131]

The practice is premised on an assumption that plaintiffs' earning potential will be fully restored when treatment is complete. It assumes full recovery with no recognition of some impairment, even if partial, at least before and during treatment. As well, it ignores the possibility of relapse. The likelihood of the effects of abuse impairing earning potential would often be reduced with treatment. However, the risk cannot be completely eliminated in all cases. In *D.W. v. Canada*, the Court acknowledged that the plaintiff could experience flashbacks of the abuse in spite of treatment but maintained that this did not warrant compensation for loss of future earnings because plaintiff is still expected to work his full potential.[132] This is contrary to views expressed in some non-institutional sexual abuse cases. An allowance has been made for future loss of income in some cases for the possibility of lingering effects of the consequences of abuse and the likelihood that it could impair the plaintiff's employability notwithstanding treatment.[133] Damages for future wage loss have also been allowed in cases where the plaintiff is expected to make full recovery and to overcome any employment impairments arising from the abuse in recognition of the fact that the plaintiff will continue to experience some impairment until her recovery is complete.[134]

Some courts seem to be more willing to acknowledge the impact of psychological effects of abuse on pre-trial loss of income and past and future non-pecuniary effects but not in relation to future earning capacity.[135] Where the effects of abuse include psychological harm, which is commonplace for sexual and childhood abuse victims, a case for compensation for impaired

---

129 See *ibid.* at 197.

130 For example, see *P. (V.) v. Canada* (1999), 186 Sask. R. 161 (Q.B.); *D.W. supra* note 113.

131 *H.L. supra* note 113 at para.152) Fish J.

132 *D.W. supra* note 113 at para. 40.

133 For example, see *C.R. v. C.R.* [2002] B.C.J. No. 1984 (S.C.); *L.B. v. W.M.* [2003] B.C.J. No. 433 (B.C.S.C.).

134 For instance, in *D. (P.A.) v. H. (A.E.)* (1998) 49 B.C.L.R. (3d) 340 at 353-4 (B.C.S.C.), the plaintiff sued her stepfather for sexual assaults that occurred when she was between the ages of thirteen and seventeen. The court accepted evidence from a psychiatrist that he was optimistic that with counselling the plaintiff would likely recover from her injuries and overcome employment impairments. But the court also recognized that her recovery would not happen overnight and therefore awarded $50,000 for future wage loss in addition to cost of treatment.

135 In *H.L.* Fish J. for the majority did not doubt the evidence that the effects of abuse had negatively affected the plaintiff's earning potential in the past but declined to make such a finding in respect of loss of future income because there was no proper evidentiary foundation for such an award and also because the plaintiff had taken steps to address his substance abuse problem at the time of trial. Justice Fish further noted that it would be detrimental to plaintiffs if courts were to assume that any impairment in their earning capacity resulting from the defendant's wrong would continue into the future. *H.L. supra* note 113 at paras. 150-152. Yet Justice Fish affirmed the award for non-pecuniary damages for past and future emotional distress awarded at trial.

working capacity can be made even when full recovery is expected. Some residual effects may persist. It is unreasonable to expect abuse victims to completely overcome the effects of abuse on their employability immediately after the trial and reach their optimum earning potential right away.[136] To have such an expectation underestimates the effects of childhood abuse on survivors. In *H.L.*, the Supreme Court of Canada held that H.L.'s efforts to improve his situation, though unsuccessful, satisfied his duty to mitigate his damages in respect of his past loss of income.[137] However, the Court was unwilling to recognize that H.L.'s earning potential would continue to be affected, even if to a lesser degree than the pre-trial period, in the absence of evidence showing the continued effects of the abuse on his employability.

There is often a real and substantial chance that certain employment opportunities will be closed to childhood abuse victims who suffer psychological harm. This has a corresponding detrimental effect on their earning capacity over the course of their working lives.[138] The chances of continued detrimental effect on earning potential should be evaluated and compensated for based on simple probabilities. This is consistent with the capital asset approach to assessing compensation. The focus is on earning capacity as an asset, the loss of which deserves compensation.[139] The capital asset approach supports compensation for past income loss where the causal link between the tortfeasor's wrongful conduct, and the plaintiff's psychological as well as emotional injuries are established. Where the plaintiff is unable to prove the value of past impairment of working capacity on a balance of probabilities, a conventional amount might be appropriate.[140] The Supreme Court of Canada applied this approach in *Plint* in respect of loss of future employment opportunities.[141]

Emphasis on the nature, frequency, duration and circumstances surrounding sexual abuse in assessing appropriate compensation in particular cases as opposed to the effects of abuse on survivors also contributes to lower damages for Aboriginal claimants.[142] This approach is intended to achieve consistency in compensating victims. It is, however, problematic because victims' injuries are assessed against criteria that do not adequately reflect their experiences. This decontextualizes the abuses in question and dehumanizes survivors.[143] Frequency, severity, and intrusiveness of abuse are not always

---

136 See Bruce Feldthusen, "Discriminatory Damage Quantification in Civil Actions for Sexual Battery" (1994), 44 U.T.L. J. 133 at 137-138.

137 *H.L. supra* note 113 at paras.134-136.

138 See *Clarke, supra* note 96 at paras. 79-99; *Palmer v. Goodall* (1991), 53 B.C.L.R. (2d) 44 at 59 (C.A.) (Though a motor vehicle claim, Smith J.A. referred to this case with approval in *Clarke, ibid.* at para. 98).

139 See *Andrews v. Grand and Toy Alberta Ltd.* [1978] 2 S.C.R. 229.

140 This would require a relaxation of the well-settled principle that past pecuniary losses must be established on a balance of probabilities. As well, comparison between plaintiffs' pre- and post-tort earning capacity should not be restricted to assessment of future losses because their past earning capacity would also have been compromised. In *P.(V.),. supra* note 130 at para. 56-61, the Court awarded $10,000 for past income loss even in the face of less than probable causal link between the effects of abuse and the plaintiff's employability. The court noted that such an award could be supported based on evidence of a reasonable possibility of loss.

141 *Plint, supra* note 88 at para. 93..

142 For example, see *A.. (M.), supra* note 114 at 698 (Para. 35).

143 See *supra* note 37 at 1-35.

good predictors of the effects of abuse on survivors. In the case of survivors of childhood abuse in government care, their general vulnerability at those institutions - including forcible removal from their families and communities - and the delay in disclosing abuse may aggravate their injuries disproportionately when compared to the frequency and nature of abuse.[144] Effects of abuse on victims may also be exacerbated by other factors such as the breach of trust by perpetrators, children's accounts of abuse were often discredited and they were often punished for making allegations of abuse. Breach of trust in educational settings or safe environments can have further implications for victims that may not be readily apparent from simply focusing on actual incidents of abuse in 'normal' settings. The coercive and racist environment in which abuse occurred could affect survivors' perception of education and expectations from educational institutions; these institutions may no longer be perceived as a source of, or place that should open up opportunities. Rather, children may end up with physical and psychological scars that foreclose future opportunities.[145] The potential for more damaging consequences of abuse coupled with the fact that Aboriginal plaintiffs traditionally receive depressed damage awards means that such survivors hardly receive full compensation for their injuries. This also buttresses the need for a contextual approach in these cases and the necessity to modify traditional tort principles consistent with the dictates of substantive equality. A contextual approach is also necessary to ensure that victims are adequately compensated. This will also ensure that the civil justice system remains a viable option for Aboriginal victims of historical/ institutional abuses.

VII. THE LIMITATIONS DEFENCE

As already noted, part of the difficulties in the historical abuse cases is that non-sexual abuses are often excluded from consideration for being time-barred. This is a technical defence and does not nullify defendant's culpability or plaintiffs' injuries. The limitations defence should not affect defendant's liability once the actionable wrongs are determined to have significantly contributed to plaintiffs' overall condition. The results should be the same even if injury were exacerbated by the combined effect of contemporaneous and subsequent tortious acts and regardless of the identity of the other tortfeasor(s). As Justice Major pointed out in *Athey*, the fact that a plaintiff's injury has been caused by multiple tortious factors does not necessarily relieve a defendant from full responsibility to the plaintiff. Each tortfeasor is liable for actual damage caused by his/her wrongdoing. However, each tortfeasor is jointly and severally liable for the plaintiff's entire loss with a right of contribution from the co-tortfeasors under apportionment legislation.[146] The fact that this might not be a practical remedy in some situations, for example, because the tortfeasors are long dead or are insolvent does not justify departing

144 See " Section 7:Effects of Abuse" in Kaufman Report, *supra* note 58

145 See *supra* note 37 at 1-24 - 1-25.

146 *Athey, supra* note 95 at para. 22.

from this basic principle of law.[147] This position is also supported by the compensatory and loss spreading goals of tort liability.[148] The apportionment issue becomes moot where the same defendant(s) would have been liable for the other tortious conduct.

The case for not apportioning damages between causes of injury is even stronger where the same defendant would have been responsible for the allegedly statute-barred aspects of the claim.[149] The Supreme Court of Canada cautioned against permitting damages in respect of statute-barred allegations of wrongdoing to avoid frustrating legislative intent and imposing liability without proof.[150] For the most part, non-sexual abuses are not disputed but they are excluded on technical grounds. The limitation defence encourages plaintiffs to diligently prosecute claims, protects "potential defendants against stale claims" while giving closure to legal issues.[151] This puts a premium on defendants' interests at the expense of plaintiffs where the latter are barred from prosecuting their claims after the expiration of the relevant limitation period or the ultimate limitation period, regardless of how meritorious their claim might be. Plaintiffs' interests, on the other hand, are protected, for example, through the postponement of the running of time or application of the discoverability principle.[152] As well, as a matter of public policy and fairness to plaintiffs, some actions, notably claims of a sexual nature or actions based on sexual misconduct, are not subject to any limitation period. The limitation period is therefore, a matter of practicality and an evidential rule. It should be interpreted purposefully in light of victims' needs and consistent with *Charter*[153] values. Actions should be considered integrated where a plaintiff alleges a cause of action not subject to any limitation period and contemporaneous acts that may otherwise be subject to limitation periods even if perpetrated by different tortfeasors at various points in time within that period and in the same coercive environment. It is unconscionable to advance the limitations defence to defeat claims based on childhood abuse and involving breaches of trust.

The rationales underlying limitation periods may be justifiable in 'typical' claims involving definable incidents such as motor vehicle accidents. They are not readily applicable, and in fact should not be applicable in cases

---

147 See *Alderson, supra* note 127 at 139. An exception to joint and several liability may arise in some jurisdictions in cases of contributory negligence by plaintiffs, for example in British Columbia, but this situation rarely arises in historical or institutional abuse claims.

148 Although ability to pay is not the basis of liability, as between institutional defendants and innocent victims, fairness dictates that the burden should be borne by the former who not only placed the plaintiff in the precarious condition in the first place but is also usually better suited to absorb and/or spread the losses.

149 See *J.L.M. v. P.H.* (1998) B.C.J. No. 1546 at paras. 20-21 (B.C.C.A.).

150 *Plint, supra* note 88 at para. 85.

151 Attorney General of British Columbia, Civil Liability Review – Consultation Paper, 3 (April 2002) (Document no longer available on government website but author has a hardcopy on file).

152 The discoverability principle provides that for the purposes of interpreting limitation legislation, time begins to run only when the plaintiff discovers or ought reasonably to have discovered the material facts of the cause of action and realizes the connection between the harm suffered and the impugned conduct as the likely cause. See *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6 at 24.

153 *Supra* note 104.

of institutional abuse or where abuse occurs in power-dependency relationships.[154] The potential stalement of evidence is not a bar to prosecuting sexual abuse claims many years after the alleged abuse. Given the inter-related nature of sexual and non-sexual abuse experienced by plaintiffs, there is no justification for excluding the latter for being statute-barred. As has been emphasised throughout this paper, not only did both types of abuse occur in the same setting but they were also indistinguishable from plaintiffs' perspectives. Effects of both types of abuse on victims and their communities are also indistinguishable. Further, the case for not invoking the limitation defence in relation to non-sexual abuses at IRS is buttressed by the government's role in placing children in harms' way. Forcible removal of children from their homes and placement in coercive and totalizing environments in remote places made them vulnerable to abuse by their care-givers and fellow students. It is therefore morally wrong for the government to rely on the limitation defence to limit the extent of its liability for abuses suffered at those institutions. As well, given the racist underpinnings for the establishment of IRS and forced attendance of Aboriginal children, further attempts to escape liability as argued by the government fail to recognize the context of the plaintiffs' claims and are inconsistent with the expectation that the common law of torts should be interpreted in light of *Charter*[155] values.

Reliance on the limitation defence to limit the focus of inquiry to only sexual abuse and a corresponding limited compensation creates differential treatment of plaintiffs depending on the forum or jurisdiction in which they pursue their claim. The Federal Government has conceded in the context of the AIP that it is inappropriate to advance the limitations defence in relation to IRS abuses. Hence the limitations defence will be waived for claims under the AIP. There is no reason why claimants who choose to or are 'compelled' to litigate should be treated differently. As well, claimants in some jurisdictions can proceed with their claims at anytime without regard to any limitations period.[156] Legislation in Manitoba and Saskatchewan recognize that certain factors may prevent the timely prosecution of non-sexual abuses, for example where the claimant was in an intimate or dependency relationship with the perpetrator. These provinces have eliminated limitation periods for such actions, making it possible for victims of historical abuse to pursue claims for both sexual and non-sexual abuses arising from trespass to the person at anytime.[157] The presumption of incapability of initiating suit earlier under the Ontario legislation in relation to assault where the abuse occurred in an intimate or power/dependency relationship could also have the same effect of

---

154 See Janet Mosher, "Challenging Limitation Periods: Civil Claims by Adult Survivors of Incest" (1994), 44 U.T.L. J. 169 at 184-197. Although Mosher focuses on incest survivors, her reasons for abolishing limitation periods in relation to incest survivors are equally valid for doing the same with respect to victims of institutional abuse and abuse in unequal relationships.

155 *Supra* note 104.

156 As already noted, the Alberta government felt the need to waive the limitation period in relation to Ms. Muir's claim for unlawful confinement and forced sterilization as an act of good faith to ensure that she obtained a remedy for the unfortunate experience, although the trade-off in that case, non-availability of punitive damages, was problematic. See *supra* note 102.

157 See *The Limitation of Actions Act* of Manitoba, C.C.S.M. c. L150, s. 2.1(2)(b); *The Limitations Act* of Saskatchewan, S.S. c. L- 16.1, s. 16.(1) (b)(2).

eliminating the limitation period for such actions.[158] This is a public policy in favour of recognising that persons abused in power-dependency and/or trust relationships should be able to pursue their claims at anytime regardless of the risk of stalement of evidence. Protecting the interests of vulnerable persons, the importance of deterring abuse of power and trust, ensuring accountability for such abuses and eliminating barriers to legal proceedings are perceived to outweigh concerns about likely stalement of evidence and fairness to defendants.

The special circumstances of Aboriginal victims of historical abuse, whether sexual or non-sexual, require special treatment. Substantive equality demands nothing less. The legislative amendment in Manitoba was prompted by the injustice of *M.(M.)*,[159] where the court dismissed claims by former IRS students for being statute barred. In the debate preceding the passage of the amendment, the Attorney-General emphasised the importance of maintaining access to justice for victims of something as serious as childhood abuse in intimate, trust or dependency relationships and of not allowing such actions to be barred based on technicalities. The importance of eliminating limitation periods in respect of all childhood abuse in institutions or power/dependency relationships was further buttressed by the need for substantive equality. It also served to bring Manitoba law in line with the law in other jurisdictions where victims have no such barriers in proceeding with historical abuse claims. The amendment was also seen to be required as a matter of fairness among victims. In particular, former IRS students with claims against the same defendants should not be disadvantaged because of the jurisdiction in which the abuse occurred.[160]

The policy justification in favour of eliminating limitation periods for sexual abuse is equally applicable in relation to childhood non-sexual abuses that involve breaches of trust and authority. Both types of abuses leave long-lasting psychological effects that may remain latent well into victims' adulthood as well as difficulties in establishing the nexus between abuse and one's current condition. More importantly, it is almost impossible to distinguish the effects of contemporaneous sexual and non-sexual abuse in the same environment. There is no reason to privilege the effects of sexual abuse over non-sexual abuse that occurred within the same period in the same environment and with indistinguishable psychological effects. This progressive position enables former IRS students and other victims of historical abuses in Saskatchewan, Manitoba, and to some extent, Ontario, to pursue claims of sexual and non-sexual abuse at anytime. There is no reason why claimants in other jurisdictions should not have the same right, especially where the defendant could be the same party or parties. As well, since the limitation

---

158 The basic 2-year and the 15-year ultimate limitation period are both subject to the discoverability principle. *Limitations Act*, S.O. 2002, c. 24, Sch. B, s. 10 (1) and (2); s. 15(4)(a) and s. 15 (5).

159 *Supra* note 88.

160 See Hansard on Bill 8, comments by Hon. Gord Mackintosh, Minster of Justice and Attorney General, Online: Province of Manitoba <http://www.gov.mb.ca/legislature/hansard/3rd-37th/vol_010/h010.html#iob> See also comments by Hon. Mr. Shillington in debate leading to the 1993 amendment of the Saskatchewan legislation - Bill 15, *An Act to Amend the Limitation of Actions Act*, Online: The Legislative Assembly of Saskatchewan <http://www.legassembly.sk.ca/hansard/22L3S/930429e.PDF>.

mostly affects one particular group of Canadians, Aboriginal people abused in institutional and other out-of-home care programs, and the often racist underpinnings that brought the children into harm's way in the first place, any failure to ensure they have access to justice further constitutes discrimination on the basis of race. Eliminating limitation periods for these claims does not guarantee alleged victims any particular outcome. It simply provides victims the opportunity to have their day in court if they so desire.

VIII. CONCLUSION

As commendable as the *IRS Settlement Agreement* for compensating survivors of IRS-related abuses is, it does not completely replace the need for some survivors of historical and institutional abuse to advance their claims through the tort system. The *Agreement* concedes that not all claimants might want to pursue the ADR process. More importantly, not every Aboriginal survivor of historical or institutional abuse is eligible to make a claim under the *IRS Settlement Agreement.* Further, empowerment of victims of abuse in the face of historical, systemic and institutionalized racism demands that claimants must be able to freely choose a forum to pursue their claims without any constraint, be treated with dignity and respect in the forum of their choice and come out feeling that justice has been served both in terms of the process and outcome. To be a meaningful choice, the tort system must be an avenue interested in and capable of attending to the needs of victims in ways that recognize the root cause of their victimization: racism. Attempts to separate sexual and non-sexual abuses and exclude the latter from actionable wrongs are artificial, de-contextualize the claims, and constitute further victimization of claimants who have suffered undifferentiated consequences from both types of abuses. It also unfairly privileges claimants in some jurisdictions where these claims are not time-barred. Treating similarly situated claimants differently simply because of the jurisdiction in which they find themselves is contrary to the principles of substantive equality and the expressed desire for reconciliation between Aboriginal and non-Aboriginal Canadians. Finally, it also privileges claimants who choose to pursue their claims through the ADR processes because no such constraints are expected to be put on abuses for which they can claim compensation, provided they are validated. This may pressure claimants to choose ADR even if they do not find the process and/or outcome satisfying. This would undermine their right to pursue their claim in a particular forum as they see fit and should be avoided.

This paper has emphasised the importance of a flexible and contextualized approach to responding to claims by Aboriginal victims of institutional and historical abuse in the tort system. Justice requires consideration of the historical factors and processes that have produced many of these claims. In light of the sense of powerlessness that has constructed the lives of Aboriginal victims for so long and paternalistic attitudes towards them, claimants must be given a meaningful choice of forum in which to pursue their claims. Attention needs to be paid to the contextual factors underlying these claims in the tort system. These are both important steps towards restoring the dignity of victims and furthering the decolonization of Aboriginal people.