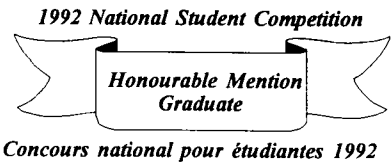


The Unravelling of Gender Bias in Personal Injury Law



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ABSTRACT

Thousands of Canadians suffer injuries each year, yet few receive any form of compensation by way of the legal system intended to provide for the victims of such injury. Women disabled due to injury are systemically ghettoized and impoverished, and the structure and practice of personal injury law play a role in this phenomenon. This paper attempts to unravel the strands of gender bias in this discrete area of law, in the process interweaving feminist methodology with substantive socio-legal research.

RÉSUMÉ

Des milliers de Canadiens et de Canadiennes subissent des blessures chaque année, mais peu de personnes reçoivent une indemnité par l'entremise du système judiciaire, qui est censé subvenir aux besoins de ces victimes. Les femmes qui sont handicapées à cause de leurs blessures se retrouvent systématiquement appauvries et dans des «ghettos». Ce phénomène est en partie attribuable à la structure et à l'exercice du droit relatif aux lésions corporelles. Dans l'article suivant, on essaie de déceler les préjugés contre les femmes dans cette branche discrète du droit. Pour ce faire, on entremêle la méthodologie féministe et des recherches socio-juridiques substantielles.

PERSONAL INJURY LAW IS CONCERNED with injuries inflicted by one person or corporation on another person or corporation in the absence of a contract. This branch of tort law requires proof of negligence on the part of the injurer before the injured victim is entitled to receive compensation. Some familiar incidents falling under the rubric of personal injury include car accidents, slips and falls, and workplace injuries. This area also includes such remote occurrences as nervous shock fol-

lowing the observance of an accident,¹ injury caused by a negligent attempt to rescue an endangered person,² and breach of a duty specified by statute.³

A person who has been injured must go through a multitude of procedures in attempting to receive compensation for the consequences of that injury. A series of psychological hurdles accompanies these procedures; one author has provided for these hurdles the

Portions of this paper rely on themes first explored in E. Gibson, "Identifying Gender Bias in Personal Injury Compensation," in J. Brockman and D. Chunn (eds.), Investigating Gender Bias: Socio-Legal Perspectives (1992, HBJ-Holt Canada). These topics are developed more extensively in E. Gibson, Delivery of Injustice to Disabled Women: Gender Bias in Systems of Compensation for Personal Injury (1992, Unpublished LL.M. thesis, Faculty of Law, University of Toronto).

rudimentary yet serviceable labels “naming, blaming and claiming.”⁴ The first step consists of an identification by the person that what happened to her or him was indeed an injury, and more precisely an experience that society and the courts recognize as injurious. This is the *naming* stage. The second step consists of the transformation in the victim’s perception of the injurious experience into the form of a grievance. This is the *blaming* stage; that is, the realization by the victim that someone else might be to blame for the injury. Without another party to accuse, or without being able to prove that another is responsible, there can be no tort action.

The third and final transformation is the *claiming* stage. The person who has perceived an injurious experience to be the fault of another must, in order to be reimbursed, actually enter a claim against the other party and request a remedy. This stage may require several actions on the part of the injured person: consulting a lawyer, deciding on the expenditure of money and energy, determining that it is feasible and *desirable* to sue another party, launching a court action, negotiating, and appearing before a judge.

The primary learning technique for the student of law is the “case method.”⁵ The student is assigned a list of reported judgments, from both trial and appellate courts, and is expected to glean out the essential elements or “truths” of law of those cases. Rarely are textbooks and theoretical treatises referenced by the student. Because law professors rely extensively on the case method, most come to view this as what law is all about. Law students are not informed that a meagre one in ten victims of accident receive any damage at all via the tort system,⁶ and that only 0.4 percent of accidents lead to a contested hearing and

judgment.⁷ This renders the case method of study relatively insignificant in light of the impotence of the courts to address the realities of the actual consequences of injury for the victim.

It became apparent to me that to engage in a feminist inquiry into this area of law, it was necessary to break away from the case law paradigm. I decided to undertake an examination of women’s plight following injury in its multifarious aspects, including the likelihood of reimbursement via the tort system, the process of assessment of damage awards, the alternate sources of compensation available, the poverty under which disabled women are forced to live, and the effects on self-esteem of the societal structures erected to serve the disabled. The broad sweep of such inquiry serves as an effective mechanism for unraveling the strands of gender bias within tort law.⁸

There is one overarching reason for singling out women accident victims for distinct analysis of their situation at the hands of the tort system, notably because, at every stage of proceedings following injury, women fare more poorly than men. The remainder of this paper presents the cumulative statistical evidence to substantiate this claim, and explores possible reasons for this finding.

The Conceptualization of a Claim: Naming and Blaming

Study results indicate that women have a lower propensity to think about claiming following the occurrence of injury. In specific terms, women victims are 10 percent less likely than men to consider seeking compensation.⁹ This paper earlier discussed the critical stages of “naming” an experience as injurious and “blaming” another as the cause of one’s injury.

We know from this 10 percent discrepancy that women are less likely to either name or blame. What are the reasons?

Nearly three-quarters of all accidents incurred by women happen not at work or on the road but in other domains, primarily at home or at sports and leisure.¹⁰ The locale of the accident has been found to be a significant factor in its potential transformation into a claim. Injuries occurring in the workplace or on the road are almost invariably followed by official reporting procedures, whether a police investigation, hospital report, job accident inquiry, or insurance claim filing. Contact with the various professionals involved in these procedures appears to sensitize the victim to the possibility of asserting a claim for damages. This is illustrated by the fact that in a major British study, approximately 70 percent of people who consulted a lawyer following personal injury stated that another person had first provided them with the idea of pursuing damages.¹¹

On the other hand, people suffering accidents in more private spheres than at work or on the highways, predominantly women,¹² stand significantly less chance of receiving information on the possibility of and procedure for asserting a legal claim. Statistics bear this out; major surveys conducted both in Britain and in the United States found that those injured in road accidents considered claiming approximately 50 percent of the time, whereas those injured in non-road or workplace setting considered claiming following a mere 9 to 10 percent of accidents.¹³

It is not surprising that women tend to incur more injuries in the home sphere, since this is the traditional domain of white women in our culture. It is possible that women who

are full-time homemakers are less likely to "name" their experience as injurious, due to greater flexibility to adapt their style of labour to incorporate a disability than in a rigid employment situation. The impairment is less obvious to the injured woman because of this adaptability. Further, even if named, there is less often an obvious party to "blame" for an injury incurred in one's home. For example, Canadians are frequently unaware that personal injury caused by the use of a defective product, one of the major precipitators of injury in the home, is grounds for a tort action against the manufacturer.¹⁴

Commencement of an Action at Law: Claiming

Once an experience has been named as injurious and another party blamed in the mind of the victim, the next step chronologically is "claiming" or proceeding to commence legal action. In order to assert a personal injury claim, the victim usually must consult a lawyer. The propensity of women to seek legal advice has been shown to be one-half that of men; specifically, 9 percent of women accident victims in one British study consulted a lawyer, as compared to 18 percent of the men.¹⁵ Once a lawyer is consulted, the next step is the commencement of an action. A major Canadian survey conducted in 1974-75 indicates that males commence an action for personal injury almost twice as frequently as do females.¹⁶ Potential reasons explored in this section include women's lack of acclimatization to legal structures, financial constraints, and time restrictions.

1. Lack of Acclimatization: First, it is my contention that women have a lower propensity to sue because of less acclimatization to the entire legal sphere. The fact that most law-

yers are men, and most judges are men, makes the legal forum more strange for women than for men. The structure is pervaded by jargon and procedures intended to come across as foreign and austere: the wearing of gowns and sometimes wigs, the routines of archaic wording and use of obscure Latin, the adversarial arrangement itself, all serve to create the mystique of access to law as available to only a privileged few. It seems obvious that the further away one is from membership in the circle of privilege, the less likely one is to consider approaching it in time of need. Conley and O'Barr describe this critique as follows:

The mastery of rule-orientation is an instrument of class hegemony: the dominant class maintains its authority over those below it by seeing to it that legal and business affairs follow a system of logic that members of the subject classes have little opportunity to acquire. This system of control is both subtle and particularly effective because rule-oriented decision making has an appearance of strict neutrality.¹⁷

Having existed on the fringe of the world of economic movers and shakers, women feel alienated from approaching the courts established to rule over such transactions. Aside from the fact that women have suffered limitations on rights of ownership and access to the inner circles of power, there may be correlated reasons in the gendered socialization of women:

Following Gilligan, we suspect that greater sensitivity to social concerns emerges from the primary socialization of females in our culture to be attentive to the web of social relations that is the fabric of domestic and everyday life. By contrast, male socialization commonly focuses on preparation for roles in public and business life where attention to rules predomi-

nates... We suspect a greater tendency among women to emphasize social relations over legal rules and a countervailing tendency among men to be oriented towards rules in preference to social considerations....¹⁸

Whatever combination of factors of socialization and proscription led to the phenomenon, it is clear that women are seldom plaintiffs. In fact, a vicious circle is established whereby their rarity makes it more difficult for women to become plaintiffs, because they feel isolated in a largely male sphere of activity. The author of one study concluded that "females, suing in their own right, without male co-plaintiffs, must be seen as a distinct oddity in Canadian civil courts."¹⁹

2. Financial Constraints: A second reason women accident victims may be disinclined to turn to the courts is monetary. Legal actions can be prohibitively expensive, and public perception of the cost of consulting a lawyer at times prevents potential clients from even making inquiries in this direction. A British study discovered that 11 percent of victims who decide not to proceed with an action are deterred by fear of legal costs, formulated without any investigation or consultation with a lawyer.²⁰ One would expect that women's lower financial resources and earning potential relative to men's result in increased apprehension about legal fees and disinclination from making inquiries regarding the costs involved.

3. Time Constraints: Thirdly, the influence of time factors cannot be ruled out. In fact, women say that they fear the time or the trouble involved is an even greater deterrent against bringing legal action than money. Nearly one-quarter of reasons given by women for not claiming fall into this category. Many of the victims who considered legal action but did not proceed to consult a lawyer made such statements as:

"I felt so poorly after the accident ... that I couldn't face doing anything."

"I felt too ill to be bothered. My mother died suddenly and with the accident and family troubles I didn't pursue the matter."

"I thought it would have involved so much...."

One victim referred to the "legal jargon" and continued "I don't think you should have to go through all the rigmarole."

"I did not wish to mix in such things, the child is all right now."

"I just wanted to forget about it. All I wanted to do was to get better."²¹

Women spend more hours than men daily on work activities, when one cumulates the time devoted to employment, housework and childcare.²² Sheer lack of time available might be one reason women are less likely to proceed with a claim. However, "trouble or bother" may be cited as the broad reason, but more difficult to pinpoint could be reasons that hide other underlying factors such as lack of comfortableness with the legal framework, fear of failure, a generalized sense of disenfranchisement, and not wishing to hurt others via the adversarial approach. Some of these additional factors can be ascertained in the following statements:

"How can you sue an ordinary working man who probably has a family to support?"

"At the time I didn't feel like claiming, knowing they were good enough to keep my job for me."

"I tend to get confused about these things. I wonder whether you have any rights."

"(I was) grateful that the firm employed me at my age of 62 and didn't want to cause them any bother."²³

Following the occurrence of an injury, the victim is often confused, tired and overworked. When her socialized disinclination to

sue combines potentially with a consideration for other people's feelings, a lack of comprehension of legal procedures and rules, a necessity for recuperation and rehabilitation connected with the injury, and physical time constraints, it is easy to comprehend why she may choose not to pursue legal action.

Likelihood of Success in Claiming

The final stage of analysis is the outcome once a court action is commenced. A study of the Canadian civil courts found "striking differences" in success rates of women as compared to men in civil actions overall. Women plaintiffs received no award at all in 81 percent of cases brought, whereas men received no award in 68 percent of cases, a differential finding the report described as "astonishing."²⁴ Finally, claims launched by women plaintiffs in Canada were found to be far less likely to reach each of the stages of issuance of judgment, final enforcement, and appeal.²⁵

In the end result, men obtain damages following 14 percent of injuries, whereas women obtain damages following 8 percent of injuries.²⁶ Likewise, women represent 43 percent of the total accident victim sample but comprise only 30 percent of successful damage claims.²⁷ These differences are startling and bring the personal injury compensation system into disrepute.

Financial Plight of Disabled Women

Statistics are not available on the financial plight specifically of women disabled due to accident. However, the main cause of disability in younger people is accident,²⁸ and there are Canadian statistics on income levels of disabled women and men. In 1984, 16 percent of disabled women and 5 percent of disabled men had no income at all. Of those with income, 76 percent of disabled women and 50 percent

of the men received less than \$10,000. Only 22 percent of the women and 38 percent of the men held paid employment in 1985, with women's wages averaging \$11,700 and men's averaging \$18,300.²⁹

These statistics are made even worse by the fact that disabled people frequently must incur additional costs by reason of their impairments. These costs include transportation, medical supplies, drugs, living aids such as wheelchairs, elevator lifts, dishwashers and home renovations. As well, home care can be extremely expensive. Tasks such as grocery shopping and house cleaning often must be paid out of the disabled woman's income pittance.³⁰

To add grievous insult to injury, disabled women are far more likely than disabled men to have no spouse to assist with physical, financial and emotional aid and support. Only 52 percent of disabled women as compared to 71 percent of disabled men live with a spouse. Twice as many disabled women as compared to non-disabled women between the ages of 35 and 54 are separated or divorced and, statistically, the likelihood of remarriage for the disabled woman is slight.³¹

Not all accident victims suffer long-term disability; however, it is important to know that those victims with the most serious residual disability, defined as "victims in the group who claimed to be affected a lot all of the time by continuing effects of injuries," have the most difficult time recovering for personal injury and, when they do, the amount of damages received tends to be lowest in proportion to the extent of injury.³² Potential reasons are the greater likelihood that the case will be defended strenuously, increased financial need resulting from the injury creating more incen-

tive to settle, and a tendency to compromise due to contingency factors and fear of receiving nothing. Ultimately, then, those most profoundly disabled by accident are left in the worst situation financially.

Multiple Disadvantage

In discussing women with disabilities, it is clear that we are talking about double disadvantage: these women are disadvantaged by reason of their gender and by reason of their disability. For disabled women of colour, elderly, very young, and aboriginal women, a complex interweaving of multiple disadvantage intensifies the discrimination suffered. The effects of problematic factors in personal injury compensation on multiply disadvantaged women are increased in severity.³³ Reasons include language barriers, discrimination, racism, cultural differences, and the frequent isolation of multiply disadvantaged women from mainstream information sources.

Conclusion

This paper has revealed some of the ways in which one area of our legal system, that of personal injury compensation, disadvantages women in comparison to men. It examined briefly the standard mode of legal analysis, that of case law, and why such mode fails to provide an accurate picture from the perspective of the accident victim. It then presented the phases of transformation of an experience into a legal claim, and the statistics that demonstrate that women are less likely to proceed through each phase, along with possible reasons. Finally, it explored the fact that women disabled due to accident are condemned to a life of poverty, and that the personal injury compensation system helps to create this phenomenon.

NOTES

1. See, for example, *Marshall v. Lionel Enterprises Inc.*, [1972] 2 O.R. 177.
2. *Horsley v. MacLaren*, [1969] 2 O.R. 139; revd [1970] 2 O.R. 487; affd (1972), 22 D.L.R. (3d) 545 (S.C.C.)
3. *Menow v. Honsberger and Jordan House Ltd.*, [1970] 1 O.R. 54; affd [1971] 1 O.R. 129; affd [1974] S.C.R. 239.
4. W. Felstinger et al., "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming..." *Law & Society Review* 15 (1980-81): 631.
5. S.M. Waddams, *Introduction to the Study of Law* (3rd ed.) (Toronto: Carswell, 1987), 27.
6. D. Harris et al., *Compensation and Support for Illness and Injury* (Oxford: Clarendon Press, 1984), 46, Figure 2.1; D. Hensler et al., *Compensation for Accidental Injuries in the United States* (Santa Monica: The Rand Corporation, 1991), 20.
7. Harris 112.
8. See, for example, H. Wishik, "To Question Everything: The Inquiries of Feminist Jurisprudence" *Berkeley Women's Law Journal* 1 (1986): 64.
9. Harris 63, Figure 2.3.
10. Harris 52.
11. Harris 65.
12. Harris 33.
13. Harris 62, Figure 2.2; Hensler 123, Table 5.3.
14. In E.P. Belobaba, *Products Liability and Personal Injury Compensation in Canada: Towards Integration and Rationalization* (Vol. 1) (Ottawa: Consumer and Corporate Affairs Canada, 1983), 4, it is estimated that a staggering 2.4 million Canadians are injured annually in the home in product-related accidents.
15. Harris 63, Figure 2.3.
16. C. McKie and P. Read, *Women in the Civil Courts*, Research Study No. 9, Special Studies Series, (Ottawa: Statistics Canada, Justice Statistics Division, 1979), 33, Table 3A.
17. J. Conley and W. O'Barr, *Rules versus Relationships* (Chicago: The University of Chicago Press, 1990), 80.
18. Conley and O'Barr 79.
19. Harris 22.
20. Harris 71.
21. As quoted in Harris 71-73.
22. Statistics Canada, *Where Does Time Go?* General Social Survey Analysis Series (Ottawa: Minister of Industry, Science and Technology, 1991).
23. As quoted in Harris 74-76.
24. Harris 54. Note that these figures are for civil actions overall; personal injury claims are included but not identified separately in the statistical tables.
25. Harris 40 and 45.
26. Harris 52, Table 2.3.
27. Harris 51.
28. National Council of Welfare, *Women and Poverty Revisited* (Ottawa: Minister of Supply and Services Canada, 1990), 114-115.
29. National Council of Welfare 115-116.
30. National Council of Welfare 117.
31. National Council of Welfare 117-118.
32. Harris 57.
33. The Harris study found that victims under the age of 16 and over the age of 65 suffered approximately one-third of all accidents but comprised a mere 11 percent of successful claimants (52). Likewise, an American study undertaken by the University of Wisconsin found that Black tort victims were less likely than whites to assert a claim (Miller and Sarat, "Grievances, Claims, and Disputes: Assessing the Adversary Culture," *Law and Society Review* 15: 552.