CULTURAL THIN SKULLS

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1. INTRODUCTION

I take as my text a number of recent court decisions in tort actions, about thirty of them. What characterizes the judgments I examine here is that in them claimants have argued (generally, though not invariably, with success) that something in their culture, their religion or both entitles them to either a finding of liability where liability would not be justified in the absence of that cultural or religious make-up, or, more commonly, greater damages than they would be entitled to in the absence of their specific cultural background.

I am not considering claims for loss of culture. In loss-of-culture cases, plaintiffs complain that what they have been deprived of is the language, skills, attitudes, and stories of their ancestors. These plaintiffs have most commonly been First Nations people, but loss-of-culture allegations have not been limited to these groups.[1] Such arguments have been advanced both in the courts[2] and also in the public reparations scheme for government compensation in respect of mistreatment at residential schools. Claimants in those suits maintain that that they do not have a culture or, rather, they lack the intellectual and cultural inheritance they should rightfully have. They may assert that the theft of their cultural legacy from them is a stand-alone cause of action. More plausibly, they aver that their loss of their cultural birthright and its traditional narratives should be counted as a harm, and perhaps even as a distinct head of damages, in the context of some traditional ground of civil liability – for instance, negligence, battery or breach of fiduciary duty.

Whether there should be a civil action for loss of culture is a challenging question, but not my concern here. My focus is rather on claims, almost always asserted in the context of negligence actions, which are brought either because of

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[1] In *Taguchi v. Stuparyk* (1994), 16 Alta. L.R. (3d) 72, 148 A.R. 359 (Q.B.) at para.68, the plaintiff's wrongful death action included the claim that, due to the death of her mother, she "had lost the opportunity to have learned the Japanese language and aspects of that culture."

[2] For example *Kwakiutl Nation v. Canada*, 2004 BCSC 490, 2 C.R.C. (6th) 127; *Kuptana v. Canada*, 2006 NWTSC 1, 45 C.P.C. (6th) 323; *Aubichon v. Canada*, 2007 SKQB 406.

personal injury to the plaintiff or the killing of a person with respect to whom the plaintiff is statutorily entitled to bring a wrongful death suit. In these actions, the plaintiffs argue that something in their cultural constitution -- which is framed as a culture different from that of the Canadian mainstream -- renders their loss more acute, more painful, or otherwise deserving of more compensation than would be awarded if someone not of that culture had been the victim of the tort. This might be because their cultural or religious background causes them to experience a loss as particularly grievous. Alternatively, it might be because the cultural predisposition of the community in which they move or the individuals with whom they must interact has the effect of intensifying the effects of their loss.

A handful of examples may assist. A plaintiff suffers facial disfigurement and cognitive disability arising from an automobile accident and argues for a larger-than-usual amount in compensation for those injuries. He bases this claim for augmented recovery on the fact that he is a member of Vancouver's Korean community and his assertion that within that group both facial scarring and mental disability are regarded as especially shameful.[3]

A woman of Somali heritage is rendered infertile due to a physician's negligence. Although she has previously given birth to four children, she asks for larger-than-normal damages for her infertility based on her assertion that in the Somali-Canadian community in which she moves women are especially valued for their reproductive capacity.[4]

A woman has her long hair shorn as a result of an accident. This is done without her husband's permission, which is apparently forbidden in Islam, or at least in the Indian-Fijian-Islamic community into which the plaintiff had been born and had married her husband before emigrating. Her husband reacts with hostility to her unauthorized (by him) haircutting and abuses and abandons her. Her suit against the person responsible for her physical injury includes a claim for damages for the disintegration of her marriage. The court grants it, stating, "I see no reason why [the defendant] should not take [the plaintiff] in the family and cultural setting that she lived."[5]

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[3] *Lee v. Dawson*, 2006 BCCA 159, 267 D.L.R. (4th) 168; application for leave to appeal to the Supreme Court of Canada dismissed [2006] 2 S.C.R. ix [*Lee*.]

[4] *Adan v. Davis* (1998), 43 C.C.L.T. (2d) 262 (Ont. Gen. Div.). A case that is in some respects similar is *Dhillon v. Zarek*, [2001] B.C.J. No. 331 (S.C.). There, the injured plaintiff claimed that her cultural upbringing (Indian) required her to work from 5:00 a.m. to 11:00 p.m. on household tasks, and that, when an accident caused by the defendant rendered her unable to continue to fulfill this regime, she felt useless, frustrated, and depressed. See also *Duley v. Friesen*, [2007] B.C.J. No. 2557 (S.C.) at para. 61.

[5] *Kavanagh v. Akthar*, [1998] NSWSC 779.

In a suit by a husband and wife in respect of an unauthorized autopsy of their child, the claim is made that the grieving parents should be awarded especially high damages due to their belief, characterized as both cultural and religious,[6] that the autopsy may have negatively affected the child's prospects for reincarnation.[7] The court notes as well that it was "relevant that the wrong was done to a couple whose vulnerability was heightened by their language and cultural isolation."[8]

In wrongful death suits in respect of the killing of their child, parents advance a variety of culturally inflected arguments. The most common is that had their child not been killed he or she would have contributed financially to the parents in an amount greater than the norm because such contribution was normal, or at least expected, within their particular culture.[9] Consider the following, from a judgment of the Court of Appeal for Ontario dealing with a claim by parents of Chinese descent in respect of the wrongful killing of their 14-year-old son:

> There was considerable evidence led at trial about the particular culture into which the deceased was born . . . This evidence concerned, among other things, the important place occupied by a first-born son. It was expected from the outset that the deceased as the To's first-born son would excel scholastically and graduate from a university with a view to obtaining highly remunerative employment. It was also expected that he would be obedient and provide financial and social support for his parents and direct assistance to his sister, Mary.[10]

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[6] So far, I have drawn no distinction between culture and religion. I have conflated those concepts mainly because the courts in the cases I am discussing have generally treated them as indistinguishable. That does not mean, however, that the two notions merit comparable treatment. One reason for regarding them differently is the *Canadian Charter of Rights and Freedoms*. The Supreme Court has noted that private law should be developed in line with *Charter* principles, and it may be pertinent here that the *Charter* treats freedom of religion as a right, but multiculturalism only as a value. That distinction may well play out in a higher level of protection being accorded to differences that can be characterized as religious in nature.

[7] *Hunter Area Health Service v. Marchlewski*, [2000] NSWCA 294.

[8] *Ibid.*, para. 81.

[9] *Sum v. Kan* (1995), 8 B.C.L.R. (3d) 91 (S.C.), aff'd [1997] B.C.J. No. 2645 (C.A.); *Lian v. Money Estate* (1996), 15 B.C.L.R. (3d) 1 (C.A.); *Trentin Estate v. Davidson*, [1997] B.C.J. No. 1687 (S.C.); *Cahoose v. Insurance Corporation of British Columbia*, 1999 BCCA 302; *Ayoub v. Dreer*, [2000] O.J. No. 3219 (S.C.J.). Similar claims have been advanced by dependants of *injured* persons pursuant to s. 61 of Ontario's *Family Law Act*, R.S.O. 1990, c. F.3: *Sandhu v. Wellington Place* (2008), 291 D.L.R. (4th) 220 (Ont. C.A.) at paras. 37-39. For brief discussion of U.S. case law on this point, see Alison Renteln, "The Influence of Culture on the Determination of Damages: How Cultural Relativism Affects the Analysis of Trauma", in R Grill *et al.*, eds, *Legal Practice and Cultural Diversity* (Farnham, U.K., Ashgate, 2009), 199.

[10] *To v. Toronto Board of Education* (2001), 55 O.R. (3d) 641 (C.A.), at para. 11.

A final example comes from a case that went to the Supreme Court of Canada. In *Mustapha v. Culligan of Canada Ltd.*[11] the plaintiff claimed that his Lebanese background explained and justified his otherwise inexplicable over-reaction to the sight of a fly in his drinking water.[12]

These cases are all relatively recent and academic discussion of them is in its infancy. The 1981 first edition of Ken Cooper-Stephenson's well-known text, *Personal Injury Damages in Canada*, makes no mention of the phenomenon, since there were no reported judgments to raise the question, and Immanuel Goldsmith's popular looseleaf digest service on damages assessment in this country still declines to address it as a distinct issue.[13] There are, however, signs of change. The second edition of Cooper-Stephenson's text takes note of some of the early cases and offers some discussion of the issue,[14] and, more recently, Jeff Berryman has wrestled with many these cases at greater length.[15] The appearance of arguments of the sort outlined above raises intriguing tensions. Canadian judges have considerable experience wrestling with the slippery concept of culture in immigration cases and likewise in certain areas of family law, in particular child custody and child protection. But the emergence of culturally related arguments in personal injury and wrongful death actions is recent. Assigning a dollar value for compensation for death or significant bodily harm is delicate work at the best of times. Despite the assistance of appellate case law that attempts to render it a formulaic exercise, damages assessment in personal injury cases presents intractable difficulties, particularly in regard to future losses. Pointing out the complexity and contradictions of damages assessment for serious personal injury has long been a favoured practice of radical critics of tort law. But on this issue their voices have not been the only ones; even the Supreme Court of Canada has acknowledged the troublesome nature of this project.[16]

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[11] *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27.

[12] The trial judge appeared to take this indication in his judgment for the plaintiff: *Mustapha v. Culligan of Canada Ltd.*, [2005] O.J. No. 1469, 32 C.C.L.T. (3d) 133 (S.C.J.). However, the Ontario Court of Appeal reversed on the issue of liability ((2006), 84 O.R. (3d) 457, 275 D.L.R. (4th) 473) and the Supreme Court of Canada dismissed the further appeal by the plaintiff. In doing so, the Supreme Court held that liability depended on foreseeability of harm to a person of reasonable fortitude and that assessing what amounted to such fortitude did not permit consideration of subjective factors such as culture: *Mustapha*, *supra* note 11 at para. 18.

[13] Ken Cooper-Stephenson, *Personal Injury Damages in Canada* (Toronto: Carswell, 1981); Immanuel Goldsmith *et al.*, *Damages for Personal Injury and Death* (Toronto: Carswell, 1959).

[14] Ken Cooper-Stephenson, *Personal Injury Damages in Canada* (Toronto: Carswell, 1996) at 167-69. He also touches on the matter in his chapter "Corrective Justice, Substantive Equality and Tort Law" in Ken Cooper-Stephenson and Elaine Gibson, eds., *Tort Theory* (North York., Ont.: Captus, 1993) 48 at 61.

[15] Jeff Berryman, "Accommodating Ethnic and Cultural Factors in Damages for Personal Injury" (2007) 40 U.B.C. L. Rev. 1.

[16] *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 236-37[*Andrews*.]

Adding culture as a factor increases the complexity of the already difficult damages assessment process. Furthermore, it has the potential to politicize damages assessment by bringing it into explicit association with some other high-profile public policy debates. Multiculturalism has of late generated alarmist critiques in connection with its perceived support for a new tribalism and an associated threat to equality and democracy,[17] or at least to national and social cohesion. This has raised anxieties and has prompted a retreat from official governmental multiculturalism in some liberal states, Canada included. It may seem impertinent to suggest that the politically sheltered exercise of damages assessment can raise issues that associate it with the charged disputes around, for instance, authorizing the application of Sharia law in the arbitration of family disputes, allowing schoolboys to carry kirpans, or permitting women to vote while their faces are veiled by hijabs. Nevertheless, I suggest that culturally couched claims in personal injury suits have at least a resonance with other current issues of diversity politics. Lurking not far in the background are the familiar issues of the limits of minority accommodation, state condonation of illiberal practices (in particular practices that are blatantly patriarchal), and backlash against immigration levels.

While I am unable to offer a comprehensive template for how these new claims should be assessed, I hope here to grapple with these cases a way that may shed some light on them and spark discussion. Before I do, however, I offer a number of preliminary observations that define the issue more tightly than I have done so far and also attempt to situate it in relation to other areas where the notion of culture becomes relevant to justice.

2. DELIMITING THE ISSUE

First, I do not consider here the decisions in which religious beliefs or cultural tendencies are advanced as a justification for a failure to mitigate. The most obvious sort of case here would be one where a Jehovah's Witness refused, in the face of medical advice, to assent to a blood transfusion–that is, a transfusion needed to minimize bodily harm consequent on some initial injury inflicted by a tortfeasor. That plaintiff might then want to claim against the wrongdoer in respect of the whole of his loss, including that

[17] See especially Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Cambridge, Mass.: Harvard U. Press, 2001).

which would not be present if the plaintiff had consentedt to be transfused.[18] That problem might be considered under the rubric of culture and damages, but I do not take it up here. My justification for that is based the principle of mitigation, a feature of tort doctrine that some might see as contingent. This principle requires post-injury behaviour on the part of the plaintiff that must be characterized as reasonable, and, in assessing that, the standard required of the injured party is an objective one. Thus when the law wrestles with the relevance of a Bible-based refusal to receive a transfusion, it does so in terms of whether that refusal can, for legal purposes, be characterized as reasonable or, alternatively, whether the fact that the claim rests on religion trumps the mitigation requirement and so excuses the plaintiff's behaviour from scrutiny on grounds of reasonableness.[19]

The question of when and how culture becomes relevant to the objective standard of the common law's reasonable person is one that has engendered plenty of commentary and debate. Mayo Moran, for instance, has devoted an entire book to how negligence law's standard of the reasonable person collides, often unsatisfactorily, with personal differences based on gender, intellectual and physical ability, and, to a lesser extent, culture.[20] Whether, in the face of such differences, a commitment to objective standards undermines the law's claim to fair and equal treatment is an important question, but not one that maps directly onto the concerns generated by the damages cases. This is because with the damages cases that are my focus here the law takes a different starting point. It famously (and arguably misleadingly) eschews objectivity and says that a wrongdoer takes her victim as she finds him, with all of that defendant's idiosyncrasies and personal specificity. To quote a British Columbia case where the court took into account the intense disgrace a woman of Japanese upbringing

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[18] A memorable variation on this theme is the case from the United States *Friedman v. New York*, 282 N.Y.S. 2d 858 (Ct. Cl. 1967). There a young woman and her friend found themselves on a ski lift that was mistakenly shut down for the night while they were still in it. She faced the prospect of spending the night alone in the chair lift with an unmarried male. The woman jumped out, sustaining a physical injury. She claimed against the ski-lift operator for the injury from jumping. Jumping from the ski lift seemed like an objectively unreasonable thing to do, and in the context of this tort plaintiff behaviour that is judicially characterized as unreasonable can operate to diminish damages and perhaps even to cut off liability entirely. But the plaintiff gave evidence that she was an ultra-orthodox Jew and further, in a claim assisted by expert evidence from a rabbi, that as an unmarried orthodox Jewish woman she should not spend the night alone with a man. Therefore, the plaintiff argued, viewed in light of her religion her behaviour must be regarded by the law as reasonable, entitling her to full recovery in respect of her physical injury.

[19] For an argument that the latter approach is preferable see Marc Ramsay, "The Religious Beliefs of Tort Victims: Religious Thin Skulls or Failures of Mitigation?" (2007) 20 Can. J. Law & Juris. 399 and Anne Loomis, "Thou Shalt Take Thy Victim as Thou Findest Him: Religious Conviction as a Pre-Existing State not Subject to the Avoidable Consequences Doctrine" (2007) 14 Geo. Mason L. Rev. 473.

[20] Mayo Moran, *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard* (Oxford, Oxford University Press, 1993).

would feel at being the victim of a sexual battery, "the defendant must, for the purpose of assessment of damages, accept [the plaintiff's] personality and cultural upbringing as part of who she is."[21] That is, unlike mitigation, damages assessment starts from a position of subjectivity. Objective elements, insofar as they might be introduced by a foreseeability limitation, aspects of causation doctrine, or requirements that certain harms must be ones that an average person would have suffered,[22] play a subordinate role.

All of this distinguishes the damages cases examined here from those that raise mitigation issues. Arguably the subjectivity inherent in the compensation principle should go further and render claims for culturally augmented damages unproblematic. That is, while in the Jehovah's Witness blood transfusion case it is easy to see that the clash between a requirement of objective reasonableness on one hand and religious freedom on the other presents courts with a dilemma, one might think that in the take-your-victim-as-you-find-him realm of simple damages quantification that dilemma would evaporate. All a court would be left with would be pure questions of fact: does the cultural difference exist on the facts of this case and, if so, does it operate to intensify the plaintiff's loss? After all, courts assessing damages in personal injury cases already look at a wide variety of the plaintiff's personal attributes and circumstances: her education, skills, hobbies, family situation, work history, pre-accident physical health, and so on. What could be so controversial about adding culture to that list?

Things, however, are not so simple. While the problems thrown up by the appearance of culture in damages assessment may be less charged than the religious mitigation (Jehovah's Witness blood transfusion) cases, they are nevertheless significant. Even when our starting point is the plaintiff's subjective situation, what counts as or intensifies an injury is never an entirely value-free exercise. That will certainly be the case with claims that raise associations with the high-profile public policy debates mentioned above and the argument that accommodation of minorities has gone so far as to amount to "a relativist rejection of liberalism."[23] Even if we regard these claims as raising only issues of fact, the concept of culture is sufficiently nebulous that its appearance in the damages-assessment context is worthy of examination.

Next, it should be noted that all the above examples and all the other cases I examine below present arguments by *plaintiffs* for increased damages on the ground that something in their cultural or religious background intensifies or augments the

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[21] *C.Y. v. Perreault*, 2006 BCSC 545 at para. 28[*C.Y.*]

[22] For instance that for stand-alone psychiatric harm to be a compensable injury it must have been harm that a person of reasonably robust mental constitution might have suffered. See *supra* note 12.

[23] Will Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford: Oxford U. Press, 2007), at 109.

harms they have suffered. I am not dealing with comparable claims by *defendants* to the effect that a plaintiff's damages should be reduced because something in that victim's cultural background renders his or her injuries less severe. The reason for this is simply that I have not come across such cases.[24]

Immediate qualification is necessary here. Judges in personal injury litigation are certainly no strangers to arguments made by defendants that a successful plaintiff's damages award should be limited because the plaintiff has lost less than the norm, at least insofar as that norm is measured by the way a white male might be affected by that same injury. The most commonly encountered version of this argument is that female personal injury victims should get less than men in claims for future lost wages since, due to differences in male and female earning patterns, a female plaintiff, had she not been injured, should have expected to get less over the course of her earning years. That is, a young woman's pre-accident earning capacity may be less than that of a comparably-situated man. The gendered wage issue poses a head-on clash between the compensation principle and gender equality, one that both courts and scholars have wrestled with. With infant plaintiffs, courts may be able to avoid resolving that clash by confecting the finding of fact that, in twenty years' time, when the infant would have entered the work force, differences between male and female earning patterns will have disappeared. But the optimistic option of assuming that in the next generation the manifestations of patriarchy will have been weeded out of the Canadian employment scene will not be open where the plaintiff is a teenager on the verge of entering a working environment that has not yet been purged of sexism. In such cases it is hard to avoid the collision between the compensation principle and the judicial inclination not to participate in perpetuation inequality. Comparable arguments and tensions arise in respect of defendants' arguments that already-injured persons (the disabled) should get less for some injury because they have lost less than a fully-abled person would have.[25]

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[24] At most, one sees cases like *Ayeras v. Front Runner Frieght Ltd.*, [1998] B.C.J. No. 1803 (S.C.), where a plaintiff's cultural claim is countered by one from the defendant. *Ayeras* was a wrongful-death claim where parents argued (at para. 20) that had she not been killed their daughter "would have lived with her parents and supported them in their old age for the rest of their lives, following a Philippine tradition of 'pay back,' whereby a child is obliged to support their parents according to their ability." The court refused augmented damages on this point, and part of its reasoning seems to give effect to what we might characterize as a species of defendants' cultural argument. At para. 23, the court noted that before the deceased daughter "could have contributed to her parents' financial support, she would have had to find employment herself. Being a recent immigrant she faced a number of obstacles in a job market in which even native born Canadians find difficulty in obtaining employment."

[25] Darcy MacPherson, "Damage Quantification in Tort and Pre-Existing Conditions: Arguments for a Reconceptualization", in D. Pothier and R. Devlin, eds., *Critical Disability Theory: Essays in Philosophy, Politics, Policy, and Law* (Vancouver: UBC Press, 2006).

More closely analogous to the arguments in the cases I examine here are claims raised by some defendants in personal injury cases where the plaintiffs are First Nations persons whose future career prospects might be projected to be less bright, or at least less lucrative than the Canadian norm.[26] Defendants in such suits, although scrupulous to avoid the argument that the plaintiff should get less simply *because* they are a First Nations person, have sometimes deployed arguments such as the following: the plaintiff's career prospects were not good because he or she previously scored low on IQ tests, or because he or she had the social disadvantage of coming from a single-parent family or one troubled by marital discord, or because he or she lived on or near a reserve with limited economic opportunities, or because his or her work history demonstrated a lack of ambition.

Arguably factors of this sort have the potential to function as a crypto-cultural defence. Defendants who wish to avoid risking the loss of a decision-maker's sympathy by opening themselves up to the perception of perpetuating cultural stereotypes, reaping the windfall benefits of societal discrimination or being downright racist can, as a tactical move, easily dredge up a range of proxy considerations that will allow them to make what is in effect a cultural defence without ever having to name the plaintiff's ethnic or cultural group. If these are accepted by a court they will have the effect of lessening the damages award.

So in fact there may be defendant versions of cultural arguments out there, at least in disguised form. Much might then be made of the fact that when the cultural argument appears as a plaintiff's claim for higher damages it does so in the plain light of day, yet when it is a defendant's argument for lower damages it is made in the shadows, through a surrogate. As with the mitigation cases I mentioned above, a fuller inquiry into culture and personal injury would not hive off and ignore these arguments by which wrongdoers seek to deputize some facially neutral demographic factor to perform the dirty work of a cultural defence. Yet I do not deal with such claims here. My focus is on *explicit* arguments as to the impact of culture on damages, and such arguments have been advanced by plaintiffs, not defendants. At the end of this paper, I return to how we might respond to a defendant's explicit culture defence if that argument should ever get raised, but I leave discussion of the covert cultural defence (if indeed that is what it is) to another day.

Next, it should be noted that claims by plaintiffs for culturally-augmented losses have generally met with success in Canadian courts. Not surprisingly, judges have been reluctant to place an exact dollar figure on the amount by which, in any individual case, damages might be said to be amplified by virtue of the cultural claim. Occasionally they will do so. For instance, in *Kaddoura v. Farez*, an action by a young woman in respect of the wrongful death of her husband, there was evidence

[26] Several such cases are discussed in Jamie Cassels, "(In)equality and the Law of Tort: Gender, Race and the Assessment of Damages" (1995) 17 Adv. Q. 158.

that "the average very young Canadian widow has an approximately 80 percent chance of remarriage."[27] The plaintiff argued, however, that in her culture (Lebanese Muslim) remarriage was unlikely. In support of this she presented an expert witness, a sociology professor with expertise in families who testified that "in the Muslim culture a man may marry outside the Muslim religion, but a woman is not permitted to do so and that men are, for cultural reasons, disinclined to marry women who are widows."[28]

The Court accepted the argument that, for cultural reasons, the plaintiff's chances of remarriage were less than that of the average Canadian widow of her age. Moreover, it was prepared to be precise about the plaintiff's chances of marrying again, which translated directly into an ascertainable increase in the value of her award. But cases of this sort are the exception. The more common judicial response has simply been to say that the court will take the cultural argument into account in a claimant's favour, but to leave the precise monetary consequences of that somewhat vague.

While the results of plaintiff claims for increased damages due to cultural considerations are not always easily quantifiable, that should not detract from the fact that such arguments have been successful. Where they have failed it has not been due to rejection of such claims on some principled ground, but rather to a simple matter of proof. That is, courts have not always been convinced that persons of a given ethnic extraction will in fact adhere to the specific cultural practices that are thought to justify augmented damages. For instance, the wrongful death case *Fong Estate v. Gin Brothers Enterprises Ltd.*[29] was one where a cultural argument was advanced by a deceased's parents. Those parents, who were well off, claimed that had their daughter not been killed she would have contributed to their upkeep regardless of their lack of need. That is, they claimed that, in the Chinese tradition, parental lack of need was not a consideration in determining how much an adult child would give to his or her parents. The court rejected this: "I do not accept that need is not a consideration in determining the scale of generosity which a child in the oriental tradition, living in Canada today, would display towards his or her parents."[30]

However, decisions like *Fong Estate* are the exception. The factual assertions by plaintiffs as to their cultural difference from the majority have generally

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[27] *Kaddoura v. Farez*, [1994] B.C.J. No. 1553 (S.C.) at para. 10 [*Kaddoura*].

[28] *Ibid.*, at para. 11. Other cases where cultural background was said to have a negative effect on prospects of remarriage, thus increasing the size of a wrongful death award, are *Bhupal v. Connolly*, [1994] B.C.J. No. 1679 (S.C.); *Shergill v. Taylor*, [1993] B.C.J. No. 1806 (S.C.) [*Shergill*]; *Wei Estate v. Dales*, [1998] O.J. 1411 (Gen. Div.), rev'd on liability, [2000] O.J. No 2753 (C.A.); and *Isildar v. Kanata Diving Supply*, [2008] O.J. No 2406 (S.C.J.). The cultures in these four cases were, respectively, Indian, Sikh, Chinese and Turkish.

[29] *Fong Estate v. Gin Brothers Enterprises Ltd.*, [1990] B.C.J. 1138 (S.C.).

[30] *Ibid.* For another case where a comparable claim was rejected on the facts see *Yu v. Yu* (1999), 48 M.V.R. (3d) 285 (B.C.S.C.) at para. 34.

been accepted as true and, when accepted, they have generally translated into higher damages awards.

This relative success of the cultural claim in the damages sphere stands in contrast to its reception in criminal law, where claims for special treatment due to cultural difference have met with some opposition.[31] In the criminal realm, culture most commonly raises its head as the dreaded cultural defence, where accused persons argue that something in their ethnicity entitles them either to a defence resulting in acquittal or to a lesser sentence. For instance, they come from a culture that especially prizes personal honour and where dishonour or the prospect of it justifies a certain (otherwise criminal) course of action. I should note that, at least in Canadian criminal law, the phrase "cultural defence" does not denote a formal defence that goes under that name. Rather, in the so-called cultural defence ethnicity or national background becomes relevant to some recognized ground for defeating a criminal conviction, for instance, an argument that there was no *mens rea*, that there was insanity or provocation, or that the accused acted in self-defence. Alternatively, culture may simply be raised as something that goes to minimizing a sentence.[32]

I call it the *dreaded* cultural defence because of widespread reluctance to allow culture to mitigate criminal responsibility. Acknowledging that something in an accused's cultural background might justify an acquittal for otherwise criminal behaviour seems to be a step down the path to an individualized justice which corrupts the equal protection that should be offered by the criminal law. In short, it threatens anarchy. That there should be this disparity between the criminal law's considerable resistance to the cultural defence and private law's relatively warm embrace of claims for culture-based or culturally-amplified damages is not especially surprising. Culture becomes pertinent to the criminal law because it concerns the responsibility of the accused, where objectivity is a prime concern. By way of contrast, the touchstone in private law is compensation, as measured by the loss to the plaintiff. The prime values here are subjectivity and individuality, best exemplified by the slogan "the defendant

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[31] See, for instance, *R. v. Nahar* (2004), 20 C.R. (6th) 30 (B.C.C.A.).

[32] As in the much discussed s. 718.2(e) of the *Criminal Code*, R.S.C. 1985, c. C-46, which invites, and indeed requires, a sentencing judge to "take into consideration . . . all available sanctions other than imprisonment that are reasonable in the circumstances . . . with particular attention to the circumstances of Aboriginal offenders." Alison Renteln has argued that a general cultural defence should be recognized in criminal law under that name: *The Cultural Defense* (New York: Oxford University Press, 2005).

takes the plaintiff as she finds him,"[33] and this should make arguments for culturally increased damages unobjectionable.

3. PLAYING THE CULTURE CARD – THREE PROBLEMS

Many aspects of the relationship between ethnicity and damages assessment might be worthy of commentary. I confine myself to three. The first is the use of the concept, or at least the word, culture in these cases. The notion of culture is a contested one, not easily defined, yet in the decided cases it is commonly treated as an unproblematic notion, the meaning of which is universally agreed on. The second problem associated with the rise of culture-based claims in personal injury cases is that of cultural practices which might, to the majority, appear objectionable, or at least unworthy of perpetuation in Canada. To the extent courts rely on such practices in their damages calculations they encounter problems not unlike that associated with the use of gendered earnings tables to calculate damages for a female plaintiff's lost earning capacity. The third problem is what to do with the cultural argument when it is raised by a defendant.

(A) Culture?

In these cases for culturally-intensified losses, courts have had to deal with a concept that no one particularly cares to define and one which, in other contexts, they have been accused of handling clumsily.[34] Culture in the damages cases typically comes into play as a descriptor of the plaintiff (just as age, sex, and occupation might be) and it operates to permit a court to treat a given set of actions as normal, expected, or reasonable even though that behaviour might otherwise not be regarded in that fashion. It permits a plaintiff to say of a given reaction or behaviour something like, "you might not think that such-and-such reaction (or behaviour, or suffering) is normal, and indeed you might doubt me when I say that I have that reaction, but within culture X

[33] See, for instance, the title of the Loomis article, *supra* note 19. Of course that phrase "the defendant must take the plaintiff as he finds him" is a perilous one that has led many law students astray. Its danger lies in the fact that it is catchy, easily committed to memory, and often right, but also, and herein rests the danger, not universally accurate. The concepts of foreseeability, remoteness, mitigation, contributory negligence, and sometimes factual causation introduce features of objectivity which direct courts, in some circumstances, to hold plaintiffs to objective standards, standards which have at least the potential to effectively strip those plaintiffs of any cultural and religious specificity they might hope to advert to and rely on. Arguably, through the growth in use of the victim impact statement in ss. 722 *et seq*. of the *Criminal Code*, Canadian criminal law is coming to give greater prominence to the role of the victim. It would be interesting to examine victim impact statements to see whether they contain an increase in references to ways in which the cultural background of the victim intensifies the negative consequences of the criminal behaviour they have suffered from.

[34] Neil Vallance, "The Misuse of 'Culture' by the Supreme Court of Canada" in Avigail Eisenberg, ed., *Diversity and Equality: The Changing Framework of Freedom in Canada* (Vancouver: UBC Press, 2006). Vallance's focus is on public law cases such as those dealing with Aboriginal or language rights.

a reaction of that sort is indeed normal and, since I belong to culture X, you should believe me when I say that I have that reaction."

In employing the concept of culture, judges have at times been prepared to recognize it as part of the complex dynamic of human personality formation. They have occasionally been willing to view cultural practices as mutable and cultural boundaries as permeable. It seems particularly important that courts acknowledge cultural flux in the cases of the sort we are discussing here, where, pretty much by definition, the persons concerned will be of mixed culture. Unlike refugee cases, where the refugee claimant might have passed almost all of his life in a relatively homogenous cultural setting and might thus exhibit what we could call a "pure" cultural background, the damages cases typically deal with persons who have spent some time in Canada. Often they have lived their entire life here, and have done so in a way that entailed considerable exposure to the majority culture. Some courts have recognized this. Recall the passage from *Fong Estate*, where the judge talked about "a child in the oriental tradition, *living in Canada today* . . . ."[35] [emphasis added] There, the Court recognized that the culture of this plaintiff was a product both of a foreign cultural heritage and many years spent living in this country, with its melting pot forces.[36]

This contrasts, however, with many decisions in this area where courts have tended to adopt an approach to culture that seems static, uncritical and reductionist. In those cases, culture is regarded as an essence; it is treated as a primordial and unchanging concept, rather than something continually being forged by human practices. The use

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[35] *Supra* note 30.

[36] In this connection, *Mustapha* (*supra* note 11) presented a prime opportunity for a nuanced judicial consideration of culture. The cultural aspect of that claim appeared to rest, not on a static contrast between Canadian and Lebanese cultural practices, but on an assertion about the effect on the plaintiff's personality of the shift from one to another. It was a claim about the immigrant experience. Recall that the plaintiff's claim concerned his extreme psychological reaction at the sight of a fly (or perhaps a fly and a half) in water that he had planned to drink. The plaintiff came to Canada from Lebanon at the age of 16. His case did not appear to rest on any assertion that all persons in Lebanon would react as he did to the sight on an insect in something they might later have consumed. Rather, at least insofar as one can infer it from a reading of the reasons of the trial judge, the plaintiff's argument is that there was something in the shift from Lebanon (where he spent the first half of his life) to Ontario (where he passed the second) that explained his reaction. Perhaps he thought he had left flies behind when he emigrated and was distressed to discover that he had not.
Recently Margo Louise Foster has offered a critical reading of *Mustapha*: "There was a High Court That Swatted a Fly . . . But Why? Mental Disability in the Negligent Infliction of Psychiatric Injury and the Decisions in *Mustapha v. Culligan*" (2009) 14 Appeal 37. Foster's work draws on feminist theory and critical disability theory, but in a section making use of post-colonial theory, she examines the cultural claims in that case. Ultimately, Foster is undecided both about whether *Mustapha* was correctly decided and about whether his cultural background should have been considered in assessing the legitimacy of his claim.

of the term culture is reflected in the labels used to describe plaintiffs who raise the culture issue: such a plaintiff may be referred to as being of Chinese culture, despite the fact that she has spent a majority of her life in Canada and has English as her first, and perhaps sole, language. The reasons in *Kaddoura v. Farez*[37] are typical here. The court begins by describing the plaintiff as someone who was born and raised in Calgary, who went to high school and college in that city, and who then got a job there. In the next paragraph we are told that she is Lebanese. She is not described as a Lebanese-Canadian or a Canadian of Lebanese extraction (or cultural background, or parentage, or whatever), but simply as Lebanese, *tout court*, as though there might be no difference between a person who was born and bred in Calgary but had parents who were from Lebanon and one born and raised in Beirut.

Of course one would not expect court judgments to discuss a concept like culture in the language of a graduate dissertation in sociology. Doubtless we are relieved that they do not. After all, the language and concepts that judges deploy are largely those given them by the persons who present the cases. Those persons are lawyers, who are unlikely to resort to a non-essentialist or remotely post-modern view of culture. The professoriate may profit from problematizing culture, but lawyers and their clients are unlikely to.

While we can all rest happy that courts will leave it to academics to turn culture into some functionally unmanageable notion, however, I suggest there is one area where there is room for judges to be more sensitive than they usually have been to the nuanced role that culture plays in Canada today: evidence. The cases I have read reveal three main sources of evidence of cultural practices pertinent to damages claims. The most common source of such evidence is plaintiffs. Overwhelmingly in these cases, the evidence as to cultural practices comes from the unsupported testimony of plaintiffs. The other source is the one we see used for evidence of culture in Aboriginal rights cases, expert evidence. However, expertise in these cases can come from two distinct sources: one is academics, who generally offer statistical evidence and typically adopt an external view;[38] the other is authority figures from within the cultural tradition itself – for instance, patriarchs such as rabbis or imams.[39]

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[37] *Supra* note 27. I do not explore that here. Most of the cultures discussed in the reported cases take their labels from nation states, for example, Laotian, as in *Phoutharath v. Moscrop*, [2002] B.C.J. No. 994 (S.C.). In the alternative, where the nation state is one that might not be viewed sympathetically, a party can resort to some other label: for instance, while the plaintiff in *Alavinejad v. Farimani*, [1991] B.C.J. No. 3936 (S.C.) was prepared to describe herself as being of Iranian culture, in *Montgomery v. Alereza*, [2007] B.C.J. No. 2445 the phrase "Persian culture" was used instead, I assume in an attempt to distance the party from what might be regarded as a pariah state. Sometimes the labels for cultures are taken from sub-national regions, such as the Punjab.

[38] As is *Kaddoura*, *supra* note 27 and *Shergill*, *supra* note 28.

[39] As in the cases enumerated in notes 5 and 18.

Having just taken a couple of swipes at academics, I now reveal a preference for my own kind in suggesting that the best picture of the way cultural practices will play out in a given plaintiff's life is likely to be found in the offerings of those who make it their profession to study such matters. While community elders may be fine sources of evidence of the pure version of some traditional cultural practice, they may not always have the best sense of the way in which an individual's life may be shaped by the clashing and intersecting forces of a traditional culture and the dominant cultural practices extant in Canada today. Recall that the Supreme Court of Canada in *Andrews v. Grand & Toy Alberta Ltd.* called for the use professionals, namely actuaries, to provide evidence of things like life-expectancy and future earning potential.[40] While courts entertaining cultural claims will of course want to hear from plaintiffs about the *details* of how a given cultural practice is likely to affect them, I suggest that the best general evidence of the way cultural considerations will affect an injured person's life is likely to come from someone who is professionally attuned to the dynamics of cultural change in Canada today, and that is unlikely to be either a plaintiff or a patriarch.

(B) Objectionable Cultural Practices

Then there is the problem of judicial confirmation of apparently illiberal or distasteful cultural practices, a confirmation that seems to follow from awarding damages in respect of certain harms. For instance, awarding damages due to Korean-Canadian culture's greater shame about mental disability seems to exhibit elements of judicial approbation of, or at least acquiescence in, that prejudice. Similar things could be said about awards that bring into play the pronounced preferences of certain groups for first-born sons or subservient wives, or the aversion of some social groups to women who have been victims of sexual battery[41] or their unwillingness to marry widows. Again the echoes of the more high-profile public policy debates are not far in the background, most specifically, the debate about whether cultural pluralism is bad for women.

I suggest that anxieties about possible judicial endorsement of illiberal practices can be allayed, at least in part, if we bear in mind that in almost all cases the claims that might concern us are simply for an *augmentation* of damages. That is, they are claims that a given loss is greater in magnitude, but not different in kind, than would be awarded to a plaintiff from the majority culture. We should not forget that, problematic as it may be, plaintiffs of any culture, including the dominant one, could receive *some* damages in respect of the suffering connected with the shame of being mentally ill or the humiliation of being a rape victim. All that the plaintiffs in cases like *Lee v. Dawson*[42] and *C.Y. v. Perreault*[43] were claiming was that such harms

[40] *Supra* note 16.
[41] See *C.Y.*, *supra* note 21.
[42] *Supra* note 3.
[43] *Supra* note 21.

were more intense in their case than they would be in the case of a victim from the dominant culture.

That being so, the problem of judicial confirmation of illiberal practices might diminish if lawyers and courts (and law professors too) adopted the habit of expressly acknowledging the cultural specificity of *all* plaintiffs, even those from the mainstream or majority cultural backgrounds. This is simply to remember that we all have a race, an ethnicity, and so on. Being enculturated is the basis on which our autonomy rests. Although it is unlikely to happen any time soon, at least by way of a thought experiment one can conjecture that if judicial damages assessments were to start adverting to the fact that a plaintiff was from the majority or dominant culture and that therefore his compensable losses were such and such, then judicial references to the impact of injuries on persons from non-mainstream cultures might not seem so exceptional. In particular, they might be less likely to strike us as claims for special treatment.

None of that means that courts are without resources to deny or curtail damages claims that hinge on particularly outrageous practices. Just as judges might refuse to associate themselves with gender discrimination in the workforce if called upon to employ female earnings tables to calculate the value of a woman's lost future earning capacity, they retain the capacity to resist the unpalatable consequences of the compensation principle when those rest on insupportable practices, even when those practices are branded as normal within a given cultural heritage. We should recall here that the Supreme Court of Canada has acknowledged that we would not allow an injured criminal to include in his damages claim an amount related to his inability, due to his injury, to profit from future criminal activity.[44] Such a claim would be permitted if the compensation principle was the sole operative value in damages assessment, but it is not. Likewise, the Supreme Court is prepared to countenance overcompensation when that operates to promote important values and practices, as we see when the benefits of private charity and insurance are classed as collateral benefits for the purposes of damages calculation.[45]

The compensation principle is, however, a dominant one and courts need strong reasons for departing from it. Generally that means that in assessing a plaintiff's harm judges look not at the world as we might like it to be (shorn of sexism, racism, and so on), but at the world as it is, with its manifold imperfections and injustices. That should be borne in mind by judges who feel unease at incorporating some illiberal cultural practice in their damages assessment calculus. That is, judges who feel tempted to exclude consideration of some objectionable practice on public policy grounds should recall that such exclusions must be rare. In particular, it will not be easy to justify any exception in relation to a cultural practice that differs only

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[44] *Hall v. Hebert*, [1993] 2 S.C.R. 159 [*Hall*.]

[45] *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359 [*Cunningham*.]

in degree, but not in kind, from a mainstream cultural practice, one which is routinely part of the damages assessment calculus in cases where the victims are from the dominant culture.

(C) The Defendant's Cultural Claim

As noted above in part 2, the cultural argument in damages assessment has been the province of claimants. That is, the decided cases reveal instances of claims from plaintiffs that something in their cultural constitution justifies the awarding of higher-than-normal damages for a given harm, but we do not encounter comparable arguments from defendants that some feature of the plaintiff's cultural circumstances mandates *lower*-than-normal damages. Earlier I suggested explanations for why defendants might elect to steer clear of offering such arguments, even though they had the potential to result in a lower damages award. It is not especially surprising that we do not come across arguments where a wrongdoer suggests that the victim comes from a culture that values children less than most, or has a cultural background that devalues female children as much as it especially prizes male ones. Perhaps the good sense and good taste of defence counsel will insure that no such arguments are ever presented in Canadian courts.

Still, I doubt we can count on that. We cannot avoid at least glancing into the dark corners and considering whether, were such arguments to be advanced, courts should be prepared to accept them. Jeff Berryman has written in illuminating terms about the sort of cases I am examining here.[46] His conclusion, after grappling with this matter, is that the cultural argument should be a one-way street; that is, plaintiffs should be permitted to point to their culture to support a higher damages award, but defendants should not be permitted to bring in the plaintiff's ethnicity in a bid to lower the damages award.

> A plaintiff is entitled to the positive benefits that proof of adherence to a particular ethnic/cultural custom entails and to not be subject to the imposition of negative economic consequences that arguably flow from an ethnic/cultural custom they practice.[47]

Like those who would argue for the application of gender-neutral (or male) earnings tables for women who are claiming for lost future earning capacity, Berryman's position is one that calls for a limit on the compensation principle due to the overriding importance of some other value. That is, he takes the view that, even where there is an evidentiary basis for decreasing a plaintiff's damages award due to some cultural factor, courts should be prepared to rule that argument out of bounds.

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[46] Berryman, *supra* note 15.

[47] *Ibid.*, at 40.

Such a position marks a departure from the general rule, but is hardly beyond the bounds of orthodoxy. As noted above, when it comes to damages assessment the compensation principle is not the only value around.[48] What, then, are Berryman's reasons for departing from the compensation principle when it comes to the defendant's cultural argument? He begins by arguing that the common law must stay in tune with constitutional values and this includes the support in s. 27 of the *Canadian Charter of Rights and Freedoms* for multiculturalism: "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."[49]

When it comes to a plaintiff's claim for increased damages due to cultural difference, s. 27 appears to operate to reinforce the compensation principle and support recognition of the claim (always assuming it is substantiated with acceptable evidence). When it comes to a defendant's claim for reduced damages due to a plaintiff's cultural background, Berryman suggests that s. 27 calls for principled rejection of such claims, even when they seem borne out by the evidence and supported by the goal of compensation. He asserts that is so because in plaintiffs' claims for increased damages the fact that such claims are advanced by members of the cultural community in question shows that the plaintiffs "voluntarily embraces the precepts of the culture they are asserting, that is to say; they are exercising personal choice to live within the constraints of the ethnic/cultural group to which they wish to be associated."[50] Conversely, Berryman maintains, where the defendant raises the argument "the defendant is seeking to impose observance of an ethnic/cultural custom where . . . [the plaintiff] may, because of age, never have had the choice to demonstrate voluntary observance."[51]

Judicial support for such a claim would thus run against the support for multiculturalism in the *Charter* and should be rejected. To repeat Berryman's conclusion, a claimant should be:

> ...entitled to the positive benefits that proof of adherence to a particular ethnic/cultural custom entails and not to be subject to the imposition of negative economic consequences that arguably flow from an ethnic cultural custom they practice.[52]

I share Berryman's unease at contemplating the culture argument advanced by a defendant, yet I remain unconvinced by the reasons he advances for rejecting it. There can be little quarrel with his premise that in formulating common law doctrine

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[48] See *Cunningham* and *Hall*, *supra* notes 44 and 45 and accompanying text.

[49] *Canadian Charter of Rights and Freedoms*, s. 27.

[50] Berryman, *supra* note 15 at 29.

[51] *Ibid.*

[52] *Ibid.*, at 40.

courts should attend to the endorsement of multiculturalism in the *Charter*. Indeed one could go further here and argue that on this point the support for multiculturalism in the *Charter* combines with its support for autonomy to support the plaintiff's claim. (Though one might also note that there are other *Charter* values, gender equality for instance, that are not always well served by plaintiffs' culture-based claims. Here, as on so many other points, the *Charter* is hardly unequivocal.)

Leaving that aside, it is the next step in Berryman's analysis I question, the one that asserts that the plaintiff's claim rests on a voluntary embracing of his or her culture (which attracts endorsement in s. 27 of the *Charter*) while the defendant's culture-based argument does not exhibit this virtue. But is this true? A woman whose husband beats her because she cuts her hair without his permission, which is not permitted in his culture, is not necessarily embracing the precepts of that culture, voluntarily or otherwise. Nor is someone who is facially scarred and is shunned by his community because that community regards such disfigurement as shameful, or someone whose chances of remarriage are not good because few people in her community care to marry a widow. Such plaintiffs may, as a simple matter of fact, have little choice but to interact with persons from a given culture. That hardly means that they embrace it.

Even in instances where a plaintiff is making claims about her own cultural behaviour, as opposed to the culture-driven actions of those with whom she must interact, there is nothing in the plaintiff's claim that necessarily rests on free and voluntary embracing of her culture. The whole point about the idea of culture, at least as it is deployed in many of these cases, is that it is something that marks a *limit* to choice and autonomy; it is something people are subject to and affects their behaviour, sometimes whether they want it to or not.[53] Accordingly, a plaintiff's cultural argument need not stand on any valorization of his or her cultural composition, or even any notion of free selection of that culture (even assuming such a thing to be possible). To put it in an extreme fashion, plaintiffs might well dislike their culture and further despise their own observance of its practices and their inability to shed their cultural adherence, but they could still claim damages in respect of culturally augmented harms.[54]

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[53] I appreciate the contradiction between this assertion that culture marks a limit to autonomy and my earlier statement that being enculturated is the basis on which our autonomy rests, but that is simply the contradiction of the human condition. We require a base of social forms and goods in relation to which we can exercise our capacity to build our own lives, but that same community that permits our flourishing also sets some boundaries to the forms our actions can take.

[54] I can only think of my own situation here. I might be prepared to recognize many aspects of my personal make-up as deriving from middle-class WASP Canadian culture. That does not mean, however, that I *like* that culture (or even like myself), only that I recognize that culture as playing a role in my personal constitution and, could, in the context of a tort claim, recognize that as having some effect on what I experience as a harm or loss.

Similarly, nothing in a defendant's argument for a reduction of damages due to some feature of the plaintiff's cultural background rests on any assumption about a plaintiff's free will, or lack of it, in selecting their culture. It simply takes the plaintiff's cultural practices as a given, or rather, as something capable of being proven in court by the normal rules of evidence. It seems that turning the cultural claim in damages assessment into a one-way ratchet cannot rest on the presence (or absence) of the free will of plaintiffs in selecting, embracing, or valorizing their cultural make-up.

I sympathize with Berryman's anxiety at the prospect of defendants pointing to aspects of a plaintiff's culture as part of a claim to limit damages. However, if we are to convert that feeling of unease into a bar against such arguments being made then I suggest that we will need to look further afield. Members of non-majority cultural groups will commonly be less well-off financially than persons of the dominant culture, and that will be even more pronounced among recent immigrants, who are most likely to exhibit non-mainstream cultural practices. So accepting a defendant's cultural argument would frequently have the effect of minimizing damages for a victim who is already likely to be less prosperous than the average Canadian. Similarly, any time a member of the dominant culture makes reference to a cultural difference of someone from a minority culture it echoes the legacy of exclusion and racial discrimination. Moreover, probing such cultural differences of a victim when he or she is on the witness stand has the potential to be an embarrassing experience for the victim.

Both of those factors, tort law's potential to further disadvantage the poor, and the threat of courtroom embarrassment or humiliation, can in some circumstances have an effect on private law doctrine. As an instance of the former, consider *Dobson v. Dobson*,[55] where the Supreme Court of Canada considered imposing a duty of care on pregnant women in negligence to their own fetus. The majority rejected such a duty, and in part its reasoning was based on the negative economic consequences that imposing such a duty would have on persons of certain financial and ethnic circumstances.

The importance of an individual standard of assessment is emphasized by the great disparities that exist in the financial situations, education, access to health services, and ethnic backgrounds of pregnant women. These disparities would inevitably lead to an unfair application of a uniform legal standard concerned with the reasonable pregnant woman. In this regard, Cunningham J. noted in *Stallman v. Youngquist*:

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[55] *Dobson v. Dobson*, [1999] 2 S.C.R. 753 [*Dobson.*] For another instance of a court declining to permit recovery for a given head of damages and basing that decision, at least in part, on potential uneven impact on the poor, see *Rees v. Darlington Memorial Hospital NHS Trust*, [2003] UKHL 52 [*Rees.*]

> Pregnancy does not come only to those women who have within their means all that is necessary to effectuate the best possible prenatal environment: any female of child-bearing age may become pregnant. Within this pool of potential defendants are representatives of all socio-economic backgrounds: the well-educated and the ignorant; the rich and the poor; those women who have access to good health care and good prenatal care and those who, for an infinite number of reasons, have not had access to any health care services.[56]

Likewise it is possible in damages assessment to back off from pursuing the compensation principle simply because following it will, in the course of litigation, subject the plaintiff to exceptional embarrassment. A fatal accidents claim can involve exploring the chances of the surviving spouse's remarriage. It must be remarkably distressing for a recent widow, making a claim in respect of her dead husband, to be cross-examined about the chances she will remarry. Most jurisdictions permit that type of questioning, but consider this provision in Prince Edward Island's *Fatal Accidents Act*: "In assessing damages in a proceeding brought under this Act, there shall not be taken into account . . . the probability that a dependant may marry . . . ."[57]

In enacting this provision, P.E.I. appears to have made the choice that it prefers the possibility of overcompensation to the distasteful prospect of probing the remarriage chances of a recently-bereaved spouse.

The embarrassment factor seems not particularly compelling in this case, and it is noteworthy that in the analogy I raised in the previous paragraph, only one Canadian province has given in to it.[58] At best it is a makeweight. As for the argument from disparate economic impact, that generally only operates in the context of a decision about whether to impose some new, hitherto-unrecognized duty of care in negligence.[59] That is, the routine consequence of the general approach to tort damages (putting the plaintiff in the position she would have been in had her right not been violated) is one that replicates existing financial inequalities, and we do not take that as a reason for abolishing tort law or rejecting the current approach to damages assessment.[60]

We would have a better sense of whether the economic inequality consideration should justify a bar to the defendant's cultural argument if we had a definitive ruling from the Supreme Court of Canada on the gendered earnings question. Suppose the Supreme Court were to bar the use of such tables when it came to assessing

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[56] *Stallman v. Youngquist*, 531 N.E.2d 355 (1988) at p. 360

[57] *Fatal Accidents Act*, R.S.P.E.I. 1988, c. F-5, s. 7(1)(a).

[58] Though the UK has a comparable provision: *Fatal Accidents Act 1976* (U.K.), 1976 c. 30, s. 3(3) as am.

[59] See *Dobson* and *Rees*, *supra* note 55.

[60] Well we could, but we don't.

the lost earning capacity of a permanently injured female who had not yet entered the workforce. In such circumstances it would arguably be disanalogous to permit defendants to advance cultural claims to lessen the amount of the damages award made against them. However, if the compensation principle is not to give way on the gendered-earnings question then there seems little reason to bar the cultural defence in the damages assessment process. It should simply become a recognized part of injury compensation in the new multicultural Canada.