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(YOU'RE) HAVING MY BABY: SURROGACY FEES AS A COST OF FUTURE CARE AWARD IN CANADIAN TORT LAW

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ABSTRACT

In April 2017, the BC Supreme Court released its decision in *Wilhelmson v Dumma*. After a horrific motor vehicle collision in which she was critically injured, the plaintiff was left unable to bear children. Justice Sharma, in a precedent-setting decision, awarded the plaintiff \$100,000 for future surrogacy fees under the head of cost of future care. With this award, Justice Sharma attempted to return the plaintiff as close to her pre-tort position as money could do by giving her back the opportunity to have a biological child. The *Wilhelmson* decision was groundbreaking in its recognition of the plaintiff's loss of reproductive capacity as a real, tangible loss deserving of a pecuniary damages award. Historically, the tort system has often undercompensated women for procreative harm and other female-specific injuries, citing moral and policy rationales to justify the departure from ordinary principles of tort law. These arguments and rationales are often based on little more than intuition and hypothetical risks. In order to fully compensate women for their losses, courts may need to critically examine the principles that have often restricted female plaintiffs' recovery and develop creative remedies as Justice Sharma did with her award of surrogacy fees in *Wilhelmson*.

INTRODUCTION

The goal of tort damages is compensatory; it is an attempt to put the plaintiff back in the position she was in before the tortious conduct and resulting harm, as far as money can do. Of course, it is often not possible to put the plaintiff back in the same position, particularly in personal injury actions. For example, if a plaintiff is injured in a car accident and loses an arm, the court cannot give the plaintiff her arm back. However, the court can award damages to compensate the plaintiff for her pecuniary and non-pecuniary losses such as impaired ability to work, the cost of medical and other care associated with her injury, and pain and suffering resulting from the injury.

The BC Supreme Court decision in *Wilhelmson v Dumma* was groundbreaking in its attempt to fully restore the plaintiff to the position she would have been in but for the accident, which included reproductive capacity.¹ The plaintiff, Mikaela Wilhelmson, was involved in a horrific car accident in 2011 which left her critically injured. One of the biggest impacts of the collision on Ms. Wilhelmson's life was the loss of her ability to

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1 2017 BCSC 616 [*Wilhelmson*].

have a child. While she was still fertile, the injuries to her spine and abdomen rendered her unable to safely carry a child to term. In her judgment, Justice Sharma awarded the plaintiff damages for future surrogacy fees under the head of cost of future care. This award is unprecedented in Canada. While courts have attempted to compensate female plaintiffs for loss of fertility or reproductive capacity, this has traditionally been done under the head of non-pecuniary damages. In a precedent-setting decision, however, Justice Sharma recognized Ms. Wilhelmson's loss of reproductive capacity as a real, tangible loss deserving of a pecuniary damages award, in addition to its being a factor in the award of non-pecuniary damages. Justice Sharma recognized that giving Ms. Wilhelmson the opportunity to travel to the United States and hire a commercial surrogate would put her in as close a position to her pre-accident state as far as money could achieve. In this paper, I will argue that by awarding the plaintiff \$100,000 for future surrogacy fees, Justice Sharma recognized Ms. Wilhelmson's reproductive autonomy by giving her back the ability to have biological children.² Ms. Wilhelmson had this reproductive capacity before the accident but lost it due to her injuries, making Justice Sharma's approach to compensation consistent with tort law principles to restore the plaintiff to her pre-tort position.

While Justice Sharma showed respect to the plaintiff's reproductive autonomy in her judgment, this has not always been the case in tort law. Historically, tort law has often failed to fully compensate women for procreative harm and other female-specific injuries. These harms tend to be undervalued, or at times, not recognized at all.³ For example, women are often not awarded the costs of child-rearing in involuntary parenthood actions. Instead, only the costs associated with pregnancy and childbirth are awarded despite child-rearing costs being the most significant economic impact of having a child.⁴ Whether in an action for involuntary parenthood or for the loss of ability have a child, courts continue to have difficulty with fully recognizing women's reproductive autonomy and compensating them for the losses they have suffered. This unwillingness to fully compensate women for these types of injuries often runs contrary to the tort law principles of compensating plaintiffs for their losses and putting them back in their pre-tort positions.

In this paper, I will review the *Wilhelmson* decision and discuss the significance of the award of surrogacy fees, as well as Justice Sharma's reasoning for the award. Next, I will discuss the public reaction to the case, and consider why the decision was met with some discomfort. Finally, I will examine how several of the public's concerns with the *Wilhelmson* decision reflect many of the arguments and policy rationales that have historically limited women's recovery for female-specific injuries, including involuntary parenthood, loss of childbearing capacity, and shock-induced miscarriages. I will argue that these arguments and rationales are little more than intuition and hypothetical risks and should not justify

2 Professor Erin Nelson defines reproductive autonomy as "the ability to be self-determining and to act on one's own values when making the choice about whether and how to have children." See Erin Nelson, *Law, Policy and Reproductive Autonomy* (Oxford, UK: Hart Publishing, 2013) at 2.

3 Race and socioeconomic status have also played a major role in the undervaluation of women's injuries, but this is outside the scope of this paper. For a discussion on how these factors have limited plaintiffs' recovery in tort law, see Martha Chamallas & Jennifer B. Wriggins, *The Measure of Injury: Race, Gender, and Tort Law* (New York: New York University Press, 2010). Sanda Rodgers also observes, "Not all women and communities of women experience reproduction similarly. Intersecting oppressions of race, ability, class, language, location, sexual identity and family status, as well as experience of violence, compound the scope and impact of interference with reproductive autonomy." See Sanda Rodgers, "A Mother's Loss is the Price of Parenthood: the Failure of Tort Law to Recognize Birth as a Compensable Reproductive Injury" in Sanda Rodgers, Rakhi Ruparelia & Louise Bélanger-Hardy, eds, *Critical Torts* (Markham, Ont: LexisNexis Canada, 2009) 161 at 161.

4 In two-parent situations, the burden of undercompensation falls on both parents and men are also affected. More often, however, the majority of the biological, social and economic costs of raising an unplanned child fall on women, meaning that women are more negatively affected by courts' unwillingness to compensate for child-rearing costs in involuntary parenthood actions.

placing limits on women’s reproductive autonomy. Courts and lawmakers will have to examine with a critical lens the moral values that have historically limited women’s recovery in tort law, and whether they are justified. In order to fully compensate women for their injuries, courts may have to develop creative and unconventional remedies as Justice Sharma did with her surrogacy award in *Wilhelmson*.

I. WILHELMSON V DUMMA: CASE COMMENTARY

A. Background

The plaintiff, Mikaela Wilhelmson, was the sole survivor of the August 2011 crash that took the lives of three other people, including her boyfriend. She was in critical condition following the accident; she was flown to Vancouver General Hospital for emergency surgery for her life-threatening injuries, and was in a medically-induced coma for four weeks afterwards. By her doctors’ accounts, it was a miracle that the plaintiff survived the collision and resulting surgeries, and was not paralyzed.⁵ Despite her astonishing recovery, however, Ms. Wilhelmson’s injuries were severe and permanent, and they affected virtually every area of her life. Her family physician described her as “a shattered vase that was able to be ‘glued’ back together after being dropped”; “[e]ven if all the pieces were fitted together with the finest techniques available and the vase could still fulfill many of the functions it did before being shattered, it would never be the same.”⁶

In early 2016, the plaintiff became pregnant; she was “scared but also very happy because it proved she was fertile.”⁷ After all the pain the plaintiff and her family had suffered following the accident, the pregnancy was a source of joy for all of them.⁸ However, following medical advice, Ms. Wilhelmson terminated the pregnancy and suffered from severe depression after the procedure.⁹

At trial, the parties disputed whether the court should award damages to compensate the plaintiff for “complications she may suffer in pregnancy and childbirth.”¹⁰ The plaintiff asked for specific damages to cover surrogacy fees. The defendant submitted that the loss of childbearing capacity should simply remain a consideration in the quantification of general damages.¹¹

The plaintiff submitted two expert reports on her ability to conceive and carry a child post-accident. The doctors found that Ms. Wilhelmson’s fertility status was normal from a hormonal perspective, but opined that she should not carry a child due to her severe abdominal injuries and high risk of ectopic pregnancy.¹² Carrying a pregnancy would pose a significant risk to the plaintiff’s health and wellbeing, the main concern being abdominal adhesions.¹³ The doctors testified that this risk may also affect the plaintiff’s ability to conceive in the future.¹⁴ Taking all these factors into consideration, the doctors testified that Ms. Wilhelmson’s best option for having biological children would be surrogacy.¹⁵ Despite the illegal status of commercial surrogacy in Canada, the evidence showed that

5 *Wilhelmson*, *supra* note 1 at para 2.

6 *Ibid* at para 4.

7 *Ibid* at para 109.

8 *Ibid*.

9 *Ibid* at para 110.

10 *Ibid* at para 114.

11 *Ibid*.

12 *Ibid* at para 119.

13 *Ibid*.

14 *Ibid* at para 121.

15 *Ibid* at para 122.

many women have safely participated in commercial surrogacy arrangements in the United States, where this practice is legal.¹⁶

After hearing the evidence of the medical experts, Justice Sharma found that Ms. Wilhelmson's health would be put at an unreasonably high degree of risk should she attempt to conceive and carry a child to term. Justice Sharma also concluded that the best option for the plaintiff to have a biological child would be to hire a surrogate.¹⁷

B. Non-Pecuniary Damages

A psychiatrist testified at trial that the plaintiff experienced numerous mental disorders including anxiety, depression and PTSD, and noted that one of the major factors of these diagnoses was the plaintiff's fear about "her future functioning as a normal female fully engaged with family, friends and work."¹⁸ The psychiatrist testified that the plaintiff had significant concerns that she would never be able to participate in normal adult female activities like child bearing.¹⁹

Justice Sharma took the above evidence, including the doctors' testimony about the effect of the plaintiff's injuries on her reproductive capacity, very seriously in her quantification of the non-pecuniary damages award. She awarded the plaintiff the maximum award in 2017 dollars, which amounted to \$367,000. Justice Sharma held:

In my view, one of the most compelling factors justifying a maximum award for pain and suffering is the fact that Ms. Wilhelmson endured the truly awful ordeal of having to abort a child that she wanted to carry. Some might argue her injuries should not be seen to be as severe as a woman who loses the ability to get pregnant, but I disagree. Ms. Wilhelmson faces a future where she might be fertile and might be able to get pregnant again, but cannot safely carry a child. Other than abstinence, no method of birth control is 100% effective. She therefore faces a possibility at the young age of 26 of again, getting pregnant and having to abort a child that she desperately wants to have.

It is difficult to image a more agonizing situation facing a young woman who wants to have a family. *This emotional pain cannot be compensated under any other head of damage and it is entirely different, in my view, from compensation that may be appropriate by way of surrogacy fees. This situation is unique to her and I find it is deserving of significant recognition in the award for non-pecuniary damages.*²⁰

Not only did Justice Sharma give significant weight to the emotional impact the loss of reproductive capacity has had, and will continue to have on the plaintiff, but she also recognized that the award for this emotional pain is distinct from compensation that may be given by way of surrogacy fees.²¹ In this way, Justice Sharma recognized both the tangible and intangible elements of the plaintiff's loss of reproductive capacity. She awarded the plaintiff the maximum amount of non-pecuniary damages, and later in the judgment, gave her reasons for awarding the plaintiff future surrogacy fees in addition to the non-pecuniary award.

16 *Ibid* at para 123.

17 *Ibid* at para 128.

18 *Ibid* at para 145.

19 *Ibid* at para 146.

20 *Ibid* at paras 191-192 [emphasis added].

21 *Ibid*.

C. Cost of Future Care—Surrogacy Fees

At trial, both parties agreed that Ms. Wilhelmson's loss of her ability to have a child was compensable but disagreed as to which head(s) of damages the compensation should fall under. As stated above, the plaintiff argued that the award for cost of future care should include the cost of hiring a surrogate mother. The defendant submitted that the loss of reproductive capacity, along with the plaintiff's recent termination of her wanted pregnancy, should only be compensated in the non-pecuniary damages award.²²

It is notable that the plaintiff could have had the option of seeking the services of a gestational carrier in Canada. However, since commercial surrogacy is illegal in Canada, surrogate mothers are difficult to find. The long and arduous process for prospective parent(s) to find a surrogate mother in Canada often ends in frustration and disappointment. So, although Justice Sharma could have simply awarded the plaintiff the amount associated with compensating a surrogate mother for the costs incurred during pregnancy and childbirth (the only compensation one can legally pay a surrogate mother in Canada), she gave the plaintiff the opportunity to hire a surrogate in a country where commercial surrogacy is legal and, as a result, much less challenging to find a surrogate mother.

To support the argument for surrogacy fees, and to address the above issue, the plaintiff submitted that there was Canadian precedent for awarding private clinic costs and expenses associated with U.S. health care. The plaintiff argued that future surrogacy fees fell under this category.²³ The cases that the plaintiff cited for this principle were *Engqvist v Doyle*, in which the court held the test for awarding private clinic costs to be whether the care would be sufficiently necessary and beneficial to the plaintiff,²⁴ and *Morgan Estate v Newfoundland*, in which the plaintiff sought an award for medical treatment that was available in the United States but not offered in Canada and was given such an award by the court.²⁵ This damages award was also increased to reflect the higher cost of medical care in the U.S.

It is a principle of Canadian tort law that where a treatment would be sufficiently beneficial and necessary for the plaintiff, a plaintiff should not have to "make do" with government-funded programs in order to save money for the defendant.²⁶ Further, the Supreme Court of Canada noted in *Andrews v Grand & Toy* that the plaintiff's duty to mitigate does not include accepting less than ideal care arrangements in order to save the defendant money.²⁷ The most important consideration in a cost of future care award is that the plaintiff's needs are met throughout her life. The expenses involved are not relevant; the court should consider how best to compensate the plaintiff for the harm suffered at the hands of the defendant.²⁸ In *Wilhelmson*, Justice Sharma found that awarding \$100,000 in future surrogacy fees would be the best way to compensate the plaintiff for the reproductive harm she suffered, and it was not relevant that the plaintiff could seek surrogacy in Canada at a lesser expense.

Another argument the defendant made against surrogacy fees was that such an award would be contrary to public policy. In support of this position, the defendant drew the court's attention to s. 6(1) of the *Assisted Human Reproduction Act*, which makes commercial surrogacy, the practice of paying a woman to be a surrogate, illegal.²⁹ The defendant also

22 *Ibid* at para 366.

23 *Ibid* at para 368.

24 2011 BCSC 1585 at para 46, 2011 CarswellBC 3129 [*Engqvist*].

25 2007 NLCA 40, 267 Nfld & PEIR 344.

26 *Cojocar* (*Guardian ad litem of*) *v British Columbia Women's Hospital & Health Centre*, 2009 BCSC 494 at para 306, [2009] CarswellBC 917.

27 [1978] 2 SCR 229 at para 242, 1978 CanLII 1 (SCC) [*Andrews*].

28 *Williams (Guardian ad litem of) v Low*, 1999 CanLII 5117 (BC SC).

29 S.C. 2004, c. 2.

cited *57134 Manitoba Ltd. v Palmer* in support of his argument, in which the Court of Appeal upheld the trial judge's decision that the plaintiff could not be compensated for the loss of a discount, as the discount was in contravention of s. 34 of the *Combines Investigation Act*.³⁰ At para 29, the trial judge stated, "[t]he court will not lend itself to assist the plaintiff in taking advantage of another's illegal act."³¹ In *Wilhelmson*, the defendant argued that awarding surrogacy fees would be contrary to the *Assisted Human Reproduction Act*.³²

Justice Sharma rejected the defendant's assertions that an award of surrogacy fees would be contrary to public policy. In *Palmer*, the court held that its award would sanction illegal conduct, as an award based on the discount would have been contrary to the *Combines Investigation Act*.³³ Justice Sharma held that this would not be the case in an award of surrogacy fees to the plaintiff. While commercial surrogacy is illegal in Canada, the evidence showed that the practice is legal in the United States, and that it is not uncommon for Canadian couples to travel south to hire a surrogate in the U.S. Issues of illegality do not arise here because the surrogacy fees were awarded with the intention of the plaintiff traveling to the United States to hire a surrogate, where commercial surrogacy is legal, and not to engage in an illegal activity in Canada.

After considering all of the medical evidence, Justice Sharma found that hiring a surrogate would be medically necessary for the plaintiff to have a biological child and that this was "clearly compensable."³⁴ The plaintiff had met the "sufficiently beneficial and necessary" test from *Engqvist* for awarding private clinic costs, making the surrogacy award medically justifiable.³⁵ Justice Sharma reasoned that an award for surrogacy fees was necessary to restore the plaintiff to her pre-tort state. Before the accident, Ms. Wilhelmson had the ability to get pregnant (the evidence demonstrated that she had been pregnant once prior to the collision) and there was no indication that she could not have carried the child to term.³⁶ The evidence showed that the plaintiff could no longer safely do so because of the high risk of complications from her injuries.³⁷ As is a fundamental principle of tort law, the plaintiff is entitled to be put in the position in which she would have been but for the accident, and Justice Sharma found that surrogacy fees were the only way to achieve that objective. Justice Sharma held that although the plaintiff's loss of reproductive capacity had had a significant emotional impact deserving of recognition in an award of non-pecuniary damages, this loss would also have a distinct pecuniary impact later in her life when she wants to have a biological child—namely, the cost of hiring a surrogate.³⁸ Justice Sharma found that this cost was "medically necessary and reasonable. Its necessity arose directly from the accident; therefore the cost must be borne by the defendant."³⁹

In support of her decision to award the plaintiff future surrogacy fees, Justice Sharma relied on the 2008 decision of the BC Supreme Court, *Sadlowski v Yeung*.⁴⁰ In *Sadlowski*, the court awarded the plaintiff a distinct sum of \$90,000 to compensate for the loss of her fertility, independent of the non-pecuniary award of \$100,000. The judge in *Sadlowski* relied on *Semeniuk v Cox*, in which Acton J held:

30 1989 CanLII 2743 (BC CA), 37 BCLR (2d) 50.

31 1985 CanLII 572 (BC SC), 65 BCLR 355 [*Palmer*].

32 *Wilhelmson*, *supra* note 1 at para 371.

33 *Palmer*, *supra* note 31 at para 29.

34 *Wilhelmson*, *supra* note 1 at para 367.

35 *Engqvist*, *supra* note 24 at para 46.

36 *Wilhelmson*, *supra* note 1 at para 367.

37 *Ibid.*

38 *Ibid* at para 375.

39 *Ibid.*

40 2008 BCSC 456, 57 CCLT (3d) 305 [*Sadlowski*].

I am of the view on this point, however, that infertility is a type of loss not properly lumped together with the usual non-pecuniary categories of pain, suffering and loss of amenities. *Those categories cover losses which, in my view, are of a different nature and quality than the loss of the ability to bear children or to achieve the family one has planned...* I prefer... to assess quantum for infertility discretely, by reference to the circumstances of each case.⁴¹

The court in *Sadlowski* ultimately did not award the plaintiff surrogacy fees, but this was due to the finding that the evidence of the plaintiff's desire to pursue surrogacy was "highly speculative."⁴² Justice Sharma found that this was not the case here, and was persuaded that an award of surrogacy fees was more than appropriate in the plaintiff's situation.⁴³ Justice Sharma awarded Ms. Wilhelmson \$100,000 to compensate her for costs she may incur hiring a surrogate in the future.⁴⁴

II. REACTIONS TO THE WILHELMSON DECISION

The public reaction to *Wilhelmson* has been largely positive, but some have expressed discomfort at Justice Sharma's decision to award the plaintiff future surrogacy fees. Critics of this aspect of the decision cite concerns such as the commodification of children, and ask why the plaintiff needs a biological child when there are countless parentless children in need of a loving home.⁴⁵ Further, some will undoubtedly argue that the plaintiff was already compensated for her loss of reproductive capacity through the non-pecuniary damages award, so the future surrogacy fees were over the top and unnecessary.

Some of these concerns reflect the ethical, moral and policy rationales that have historically limited women's ability to fully recover for procreative harm and other female-specific injuries. While often inconsistent with tort principles, these ethical, moral and policy considerations are threaded into Canadian tort law and have the effect of unfairly undercompensating women for harms they have suffered. In the following sections, I will address some of these considerations and ask whether they justify the limits placed on women's reproductive autonomy and compensation in tort actions. I argue that these rationales stem from unfounded anxieties: there is no evidence or proof that society would suffer damage if women's reproductive autonomy and harms associated with women's sexual and reproductive interests were fully recognized.

III. THE COMMODIFICATION ANXIETY

The commodification anxiety has afflicted discussions about women's reproductive autonomy since the 19th century, particularly in the realms of commercial surrogacy and involuntary parenthood actions. There appears to be two strands of this rationale that concern policy makers, the judiciary, and the public when it comes to issues of women's reproductive liberty, including collaborative reproduction and compensation for reproductive harm in tort law. These two branches of the commodification concern are (1) the risks of exploiting and depersonalizing women, and (2) turning children into

41 2000 ABQB 18 at para 35, [2000] 4 WWR 310 [*Semeniuk*] [emphasis added].

42 *Sadlowski*, *supra* note 40 at para 133.

43 *Wilhelmson*, *supra* note 1 at para 378.

44 *Ibid* at para 379.

45 See comments on Louise Dickson, "\$100,000 for surrogacy in \$4M crash award to Nanaimo woman" (26 April 2017), posted on *Times Colonist*, online: Facebook <www.facebook.com/timescolonist/posts/10155065150144713?__tn__=-R> archived at <perma.cc/QR88-ZUAS>. See also Michael Cook, "Do we have a right to a child?" (15 May 2017), online (blog): *Mercatornet* <www.mercatornet.com/features/view/do-we-have-a-right-to-a-child/19800> archived at <perma.cc/Y25L-CNBZ>.

commodities bought and sold on a market.⁴⁶ I will address both of these concerns in turn and argue that there is no evidence that these fears would materialize, and that these hypothetical risks do not justify limiting women's reproductive autonomy and compensation for reproductive harm in tort law.

A. Exploitation of Women

An argument that often arises in the context of discussions about commercial surrogacy is that the practice exploits women by "turning them into mere cogs in a machinery of reproduction."⁴⁷

A major concern expressed when it comes to the exploitation of women is that commercial surrogacy will further the divide between affluent and indigent women; some feminists worry that women without means will be pressured to become surrogate mothers because they have fewer options for making a living, while the infertile couples hiring them will usually be of a higher class.⁴⁸ In other words, as the Brazier Report suggests, allowing the payment of surrogate mothers would induce imperfect consent.⁴⁹

This concern might best be illustrated by the practice of foreigners traveling to countries such as India, Thailand, Nepal and Mexico to seek surrogacy arrangements. This process became highly prevalent in the last decade and is known as "reproductive tourism." In 2015, following Nepal, Thailand and Mexico, India's government announced pending legislation that would ban foreigners from hiring Indian surrogates, a move that suggests the concerns about commercial surrogacy exploiting women may be justified. While the motivation behind these legislative changes is not entirely clear, there had been heated debate about the reproductive tourism market after numerous controversial cases were covered in the media. One example is the case of "Baby Gammy." In 2014, a Thai surrogate mother was left to care for a baby boy with Down syndrome after his Australian parents decided to leave him behind but take his 'healthy' sister back to Australia.⁵⁰

The practice of reproductive tourism does raise legitimate concerns about the exploitation of women through commercial surrogacy. It is also a racial and socioeconomic issue. Typically, the prospective parent(s) who hire surrogates are affluent Westerners. The vast majority of women who become surrogate mothers in countries with large surrogacy markets are poverty-stricken and have few alternatives to make a living. Arguably, these women's reproductive autonomy is being limited by having no option but to become surrogate mothers. While this is an unfortunate aspect of commercial surrogacy, is the potential exploitation of these women enough to justify banning it altogether? Professor Erin Nelson points out that if the concern about commercial surrogacy is that women will be convinced to become surrogate mothers against their autonomous wishes, this same concern seems to be present in altruistic surrogacy arrangements as well. Women who are asked by close family and friends may feel an intense pressure to act as a surrogate.⁵¹ Professor Nelson argues that without actual evidence that commercial surrogacy exploits women or

46 John A. Robertson, *Children of Choice: Freedom and the New Reproductive Technologies* (Princeton, NJ: Princeton University Press, 1994) at 140.

47 *Ibid.*

48 Naomi Pfeffer, "Eggs-ploiting Women: A Critical Feminist Analysis of the Different Principles in Transplant and Fertility Tourism" (2011) 23:5 *Reprod Biomed Online* 634.

49 UK, HC, "Surrogacy: Review for Health Ministers of Current Arrangements for Payment and Regulation", Cm 4068 in *Sessional Papers* (1997-98) 1 at paras 4.19, 4.25 [the Brazier Report].

50 Suzanne Moore, "The case of baby Gammy shows surrogacy for the repulsive trade it is", *The Guardian* (4 August 2014), online: <www.theguardian.com/commentisfree/2014/aug/04/baby-gammy-thailand-surrogacy-repulsive-trade-pattaramon-chanbua> archived at <perma.cc/XWV7-3MHH>.

51 Nelson, *supra* note 2 at 332.

interferes with their autonomous decisions about reproduction, it is problematic to argue for prohibition of these types of arrangements.⁵² Regulating reproductive autonomy poses many challenges, one of which is the difficulty in balancing the protection of women's interests, and making sure that their reproductive autonomy is respected.⁵³ In my view, strict regulation, including ensuring that surrogate mothers are paid fairly and have access to adequate medical care, is the preferable answer over an outright ban.

Professor Deckha points out that in North America, results of empirical studies suggest that concerns about the exploitation of women may be unfounded.⁵⁴ Despite feminist anxieties that it is low-income, single, women of colour with fewer economic opportunities who would resort to becoming surrogate mothers, American studies have consistently shown the opposite: that most women who agree to become surrogates, whether in altruistic or commercial arrangements, are Caucasian, Christian, in their late 20s to early 30s, with varying degrees of education.⁵⁵ Further, Karen Busby and Delaney Vun conclude, after reviewing all available empirical studies published in English, that while money is an incentive for some participants, for most women the decision to participate arises from a yearning to help a childless couple or do something unique or meaningful in their lives.⁵⁶

Professor Deckha observes that although the feminist rationale for the decisions of Canada and other Western and industrialized nations to ban commercial surrogacy focused on the exploitation of women, this criminalization has led to prospective parents from affluent countries travelling to the Global South to participate in reproductive tourism. Professor Deckha argues that under a postcolonial feminist lens, Canadian feminists should support the decriminalization and government funding of commercial surrogacy under the *Assisted Human Reproduction Act*.⁵⁷ By increasing access to surrogacy services in Canada and enticing Canadians to stay at home to access these services, the decriminalization and public funding of commercial surrogacy and other assistive reproductive technologies would reduce the exploitation of vulnerable women in the Global South.⁵⁸

Those who argue that commercial surrogacy exploits and depersonalizes women also emphasize the special nature of maternal gestation, and contend that women should not be asked to exchange their reproductive capacity for their need for money.⁵⁹ This rationale rests on the moral perception of the "symbolic demeaning of motherhood."⁶⁰ The argument is essentially based on a challenge to the *perceived* risks of commercializing reproduction; it is a concern that rests on moral values and intuition, as opposed to one based on evidence that the practice will have irreparable harm on society.

52 *Ibid.*

53 *Ibid* at 261.

54 Maneesha Deckha, "Situating Canada's commercial surrogacy ban in a transnational context: a postcolonial feminist call for legalization and public funding" (2015) 61:1 McGill LJ 59 at 64.

55 Karen Busby & Delaney Vun, "Revisiting the Handmaid's Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers" (2010) 26:1 Can J Fam L 13 at 42. For examples of empirical studies cited in Busby and Vun's work, see Janice C. Ciccarelli, *The surrogate mother: A post-birth follow-up* (Ph.D. Dissertation, California School of Professional Psychology 1997); Hazel Baslington, "The Social Organization of Surrogacy: Relinquishing a Baby and the Role of Payment in the Psychological Detachment Process" (2002) 7 Journal of Health Psychology 57; Isadore Schmulker & Betsy P. Aigen, "The terror of surrogate motherhood: Fantasies, realities and viable legislation" in J. Offerman-Zuckerberg, ed., *Gender in Transition: A New Frontier* (New York; Plenum, 1989) 235.

56 *Ibid* at 43.

57 Deckha, *supra* note 54 at 63.

58 *Ibid.*

59 Robertson, *supra* note 46 at 141.

60 *Ibid.*

These concerns arise from a moral discomfort that some feel in response to discussions about commercializing reproduction. New reproductive technologies have opened up opportunities for infertile women and couples to have biological children, but public values and morality are taking time to catch up with these developments. Gestation and childbirth are seen by many as sacred, unique experiences that are priceless and have inherent value. While it is important not to disregard these concerns, it is difficult to see how moral objections alone, without any evidence of potential irreparable harm to society to back them up, should trump an infertile woman or couple's reproductive autonomy. Individuals have wildly different morals and values, and as John Robertson argues, "such symbolic concerns alone should not override the couple's interest in having and rearing biologic offspring with the help of a freely consenting, paid collaborator."⁶¹

In my view, concerns about the exploitation of women are more pertinent in developing countries, where poverty and lack of access to education may result in young women resorting to 'renting' their wombs because they have no other options.⁶² However, where women are *freely* consenting (i.e. not becoming surrogates out of desperation and lack of other options), the exploitation of women concern holds little ground. Interests in women's freedom and wellbeing should take precedence over symbolic and moral concerns. Giving an individual or couple the freedom to hire a surrogate, and giving women the freedom to work as commercial surrogates, is more consistent with the principle of letting women control their own destinies. Moral concerns without evidence of irreparable harm should not be justification for limiting women's reproductive autonomy.

B. Commodification of Children

The second stream of the commodification anxiety also partly rests on the concern of the symbolic damage that will be done if society treats gestation as a product freely bought and sold in the marketplace. Professor Margaret Radin is the feminist legal scholar who has developed this argument most fully and is well known for developing the concept of "market inalienability." This is a term that she created to refer to what types of things should not be bought and sold in the market.⁶³

Some critics of the *Wilhelmsen* decision have suggested that by awarding the plaintiff surrogacy fees, Justice Sharma was turning children into commodities purchased through commercial surrogacy agreements, or "material compensation for pain and suffering."⁶⁴ This concern is likely a factor in the decisions of many jurisdictions to prohibit commercial surrogacy.

The authors of the Brazier Report argue that payment for gestation "risk[s] the commodification of the child to be born... [and] contravene[s] the social norms of our society."⁶⁵ The conclusion regarding surrogacy arrangements was that a surrogacy agreement including remuneration higher than expenses should be classified as a form of child purchase.⁶⁶ To many critics of commercial surrogacy, including the authors of the Brazier Report and Professor Radin, putting a price on a woman's reproductive capacity, or on a baby, is morally reprehensible. This criticism of commercial surrogacy implies that

61 *Ibid.*

62 Although, as Professor Deckha argues, it is important to consider the perspectives of the women who work as surrogates and not discount their choices to participate in this industry. Accounts from women who work as commercial surrogates in India demonstrate that they view surrogacy as a means of economic advancement that they never thought possible. See Deckha, *supra* note 54 at 59-60.

63 Margaret Jane Radin, "Market-Inalienability" (1987) 100:8 Harv L Rev 1849.

64 Cook, *supra* note 45.

65 The Brazier Report, *supra* note 49 at i.

66 *Ibid* at para 4.34.

the symbolic harm done by turning reproduction into a form of economic transaction offsets the benefits commercial surrogacy arrangements can have in facilitating parenthood for infertile women and couples. Professor Radin takes the commodification concern a step further, and argues:

If a capitalist baby industry were to come into being... how could any of us... avoid subconsciously measuring the dollar value of our children? How could our children avoid being preoccupied with measuring their own dollar value?... In the worst case, market rhetoric could create a commodified self-conception in everyone, as the result of commodifying every attribute that differentiates us and that other people value in us, and could destroy personhood as we know it.⁶⁷

John Robertson offers a strong critique of Professor Radin's argument, which is that she has failed to demonstrate that commercial surrogacy will result in the monetization or commodification of all children and women, or that it has the potential to "destroy personhood as we know it."⁶⁸ Further, I would add that equating commercial surrogacy with a "capitalist baby industry" is a sensationalistic way of looking at the practice of paying surrogate mothers for the service they provide. Emily Jackson is another feminist scholar who takes issue with Radin's dramatic description of the risks commercial surrogacy may have on society. Professor Jackson contends that Radin's case against commercial surrogacy is a "slippery slope argument revealing again unwarranted pessimism about our capacity to institute effective regulation."⁶⁹ As Professor Jackson notes, the risks Radin suggests are posed by commercial surrogacy are highly unlikely to materialize with an effectively regulated surrogacy market.

C. Involuntary Parenthood Actions

Another way in which the commodification anxiety has limited women's recovery for female-specific injuries is the commodification rationale for denying child maintenance costs in involuntary parenthood actions. Involuntary parenthood actions are tort claims that usually arise out of the negligence of a medical professional in sterilization or abortion that results in a woman or couple having a child despite taking specific action to prevent it. As Sanda Rodgers observes, it is difficult to imagine a more gendered injury.⁷⁰ Many common law jurisdictions deny full recovery for involuntary parenthood actions. Costs and expenses of pregnancy and childbirth can usually be recovered but courts are hesitant to award full child maintenance costs, despite the costs of child-rearing being the most significant economic impact of having a child. In this way, these decisions are contrary to the tort law principle to attempt to compensate plaintiffs fully for their losses, as much as money can achieve such an objective.

Proponents of this rationale, and much of society at large, feel a sense of discomfort at the idea of characterizing the birth of a child as a tortious injury.⁷¹ They argue that it commodifies children by requiring the assessment of the tangible and intangible costs they bring to a family, and this assessment to conclude a net loss that should support

67 Radin, *supra* note 63 at 1926.

68 Robertson, *supra* note 46 at 141.

69 Emily Jackson, *Regulating Reproduction: Law, Technology, and Autonomy* (Oxford, UK: Hart Publishing, 2001) at 306.

70 Rodgers, *supra* note 3 at 161.

71 Elizabeth Adjin-Tettey, "Claims of Involuntary Parenthood: Why the Resistance?" in Jason Neyers, Erika Chamberlain & Stephen Pitel, eds, *Emerging Issues in Tort Law* (Oxford, UK: Hart Publishing, 2007) 85 at 103.

compensation.⁷² Some have argued that assessing such costs will force parents to deny or suppress the love they have for the child in order to prove a net loss that will support compensation.⁷³

Another reason that women struggle to obtain full recovery in involuntary parenthood actions is biological determinism—the idea that women’s destiny is to have children, and that is their natural role.⁷⁴ The understanding of motherhood being the natural role of women, and the idea of the birth of a baby always being a “blessing,” have played a large part in limiting recovery for female plaintiffs in involuntary parenthood actions.⁷⁵

The relevant case authorities set out at least six basic approaches to compensating a woman or couple in an involuntary parenthood action. The first approach is no recovery at all, the basis for which is the idea that although the child was unplanned, or even initially unwanted, the birth of a child is an objectively positive event that should not warrant an award of damages.⁷⁶ Early English decisions took this approach and rejected claims outright on grounds of public policy, holding that a child’s birth “is a blessing and an occasion for rejoicing.”⁷⁷ This position was subsequently overruled by the 1985 case of *Thake v Maurice*, which recognized that there should be some recovery for the birth of a baby due to a negligently-performed vasectomy or sterilization.⁷⁸

The second option is total recovery, i.e. the plaintiff(s) would be awarded the total costs of carrying, giving birth to and raising the child with no “offset” for any benefits to the parents as a result of the child’s membership in the family.⁷⁹ The High Court of Australia adopted this approach in *Cattanach v Melchior*, and awarded the plaintiffs full recovery of child maintenance costs with no deductions for any of the benefits of child-rearing.⁸⁰ This decision garnered outrage and disgust from politicians and the public, which resulted in the introduction of legislative measures to reverse the effect of the judgment.⁸¹

The next approach is awarding the full costs of giving birth to and raising the child, but offset for the benefits accrued to the parents as a result of the child’s presence.⁸² A fourth avenue is compensation only for the pecuniary and non-pecuniary costs associated with pregnancy and childbirth, plus any additional costs associated with raising a child born with a disability.

The fifth approach is the “limited recovery” model—that is, limited damages only for the costs associated with pregnancy, childbirth and the initial adaptation to the newborn’s presence. This seems to be the approach of the English courts after *McFarlane v Tayside Health Board*, a case that effectively overruled *Thake* and reversed years of previously settled jurisprudence.⁸³ The court in *McFarlane* allowed recovery exclusively for the pain and inconvenience the plaintiff suffered as a result of her pregnancy and refused to award the costs of child-rearing. *McFarlane* is one of the leading cases in involuntary parenthood actions and has been widely followed by courts or modified to fit alternate circumstances.

72 *Ibid.*

73 *Ibid.*

74 Rodgers, *supra* note 3 at 161.

75 *Ibid* at 163.

76 Nelson, *supra* note 2 at 221.

77 *Udale v Bloomsbury Area Health Authority*, [1983] 1 WLR 1098 at 1109, 3 All ER 522 (HL (Eng)).

78 [1986] QB 644, 2 WLR 337 [*Thake*].

79 Nelson, *supra* note 2 at 221.

80 [2003] HCA 38, 215 CLR 1.

81 Rodgers, *supra* note 3 at 173.

82 Nelson, *supra* note 2 at 221.

83 [1999] UKHL 50, [2000] 2 AC 59 [*McFarlane*].

Finally, in *Rees v Darlington Memorial Hospital NHS Trust*, the House of Lords appears to have followed a modified *McFarlane* approach.⁸⁴ The court held that a disabled mother, who after a failed sterilization gave birth to a healthy baby, could not recover any additional costs of childcare that would result from her disability. Instead, the House of Lords awarded her a conventional sum of £15,000 in addition to the award of damages for pregnancy and birth. With respect to this conventional award, Lord Bingham explained:

To speak of losing the freedom to limit the size of one's family is to mask the real loss suffered in a situation of this kind. *This is that a parent, particularly (even today) the mother, has been denied, through the negligence of another, the opportunity to live her life in the way that she wished and planned.* I do not think that an award immediately relating to the unwanted pregnancy and birth gives adequate recognition of or does justice to that loss. I would accordingly support the suggestion favoured by Lord Millett in *McFarlane* that in all cases such as these there be a conventional award to mark the injury and loss...⁸⁵

Despite a strong dissenting speech from Lord Steyn, the majority in *Rees* held that a conventional sum of £15,000 should be awarded to the Plaintiff. While not perfect, the *Rees* decision was a step forward for courts in giving proper recognition to women's reproductive autonomy.

The law regarding recovery for involuntary parenthood is in a state of uncertainty in Canada, as the Supreme Court of Canada has yet to rule on the issue of whether child-rearing costs are recoverable.⁸⁶ Canadian courts so far seem to favour a limited recovery model, which would exclude the costs of child-rearing.⁸⁷ However, as Professor Adjin-Tettey notes, this approach is problematic because it draws a false distinction between the costs of pregnancy and childbirth and the costs of child-rearing.⁸⁸ The limited recovery approach runs contrary to the ordinary principles of tort law to compensate plaintiffs for the reasonably foreseeable losses that flow from the negligence of the defendant, and put plaintiffs as close to their pre-torts positions as money can achieve.⁸⁹ This argument will be expanded upon below.

British Columbia appears to follow a modified "limited recovery" approach, demonstrated by Parrett J's judgment in *Roe v Dabbs*.⁹⁰ *Roe* was an involuntary parenthood action arising out of a negligently performed abortion procedure. Three months after the procedure, the plaintiff discovered she was still pregnant, and a child was born as a result of the defendant's negligence. The court carefully considered the difficulties in assessing the quantum of damages in an involuntary parenthood action.⁹¹ Of particular importance to the commodification debate, Parrett J stated that courts should not negate the informed decision of a person to undergo a sterilization or abortion procedure by "assuming no harm, but a positive benefit, flows from negligently frustrating that considered decision."⁹² Parrett J continued by emphasizing the challenge of assessing damages in these cases, and noted that courts should not undergo a benefit/detriment analysis by closely examining family

84 [2003] UKHL 52, [2004] 1 AC 309 [*Rees*].

85 *Ibid* at para 8 [emphasis added].

86 Adjin-Tettey, *supra* note 71 at 88.

87 *Ibid* at 89.

88 *Ibid*.

89 *Ibid*.

90 2004 BCSC 957, 31 BCLR (4th) 158 [*Roe*].

91 *Ibid* at paras 212-220.

92 *Ibid* at para 213.

relationships.⁹³ Parrett J emphasized in *Roe* that damages are meant to be compensatory, and a court should carefully consider the individual plaintiff and his or her circumstances in tailoring an appropriate damages award.⁹⁴

Interestingly, after recognizing the harm to parents that arises out of involuntary parenthood and emphasizing the importance of the compensatory approach to damages, Parrett J found that the appropriate way to compensate plaintiffs in these types of cases should be to treat the damages as non-pecuniary in nature. Parrett J acknowledged that this approach may be seen as arbitrary but opined that attempts to fit this type of claim into an economic loss model is irrational.⁹⁵ In my view, this approach is inconsistent with the principles of tort law and does not appropriately compensate a plaintiff for her losses. Damages are meant to attempt to put the plaintiff back in the position she was in before the negligent act and resulting injury. Instead of awarding an arbitrary sum of non-pecuniary damages, courts should strive to compensate a plaintiff for her actual financial losses (including projected future expenditure on raising the child), in addition to the non-pecuniary aspects of the loss. This method is more consistent with the compensatory role of damages in tort law.

While the damages assessment process may seem uncomfortable, plaintiffs in involuntary parenthood actions should be appropriately compensated for negligent interference with their reproductive autonomy. While it goes without saying that plaintiffs in these actions love the children that come into their family, that does not mean they should go without compensation. Granting recovery to plaintiffs for the pecuniary and non-pecuniary costs associated with caring for and raising a child requires an appreciation of the ramifications of the defendant's negligence on the life of the plaintiff, particularly when the plaintiff specifically sought the defendant's assistance to avoid having children.⁹⁶ Mothers often bear the greater burden of child-rearing, meaning the biological, social and economic costs of raising an unplanned child fall primarily on women. In this way, the tortious injury of involuntary parenthood is not experienced equally by men and women.⁹⁷

The discomfort and moral objections to treating the birth of a child as a tortious injury likely stem from the idea that children, are inherently valuable and always have a net positive effect on parents' lives. However, compensating plaintiffs for the financial and emotional repercussions of negligent interference with their reproductive autonomy is not incompatible with the sentiment that human life is priceless.⁹⁸ If we look to damages awards for wrongful death, we see that there are not nearly as many moral objections in those types of actions. In fact, it is common in tort law to explore the value of human life, assess physical and mental suffering, and other similar interests; damages for pain and suffering and loss of enjoyment or expectation of life, and damages for wrongful death of family members are examples where the valuation of human life and suffering is not seen as commodification.⁹⁹ An assessment of damages in these cases involves valuing the right that has been interfered with, not putting a price tag on life itself.

Canadian common law courts, and many in other jurisdictions, have repeatedly failed to recognize negligent interference with women's right to procreative self-determination as a tortious injury deserving of full compensation; this in turn has prevented women from receiving financial compensation for the biological, financial, and social costs of bearing

93 *Ibid* at para 214.

94 *Ibid* at para 215.

95 *Ibid* at para 217.

96 Adjin-Tettey, *supra* note 71 at 109.

97 Rodgers, *supra* note 3 at 161.

98 Adjin-Tettey, *supra* note 71 at 106.

99 *Ibid* at 107.

and raising a child whose birth was the result of the defendant's negligent conduct.¹⁰⁰ As a result of many jurisdictions' rejection of full compensation for involuntary parenthood actions, the costs of bearing and raising the children fall on women and their families, largely relieving the defendants of the economic costs of their negligent actions.¹⁰¹

Although superficially, actions for involuntary parenthood and the loss of ability to have a child seem distinct because the results are so different (i.e. having a child when you didn't want to vs. wanting to have a child but not being able to), the core impact is the same. With respect to involuntary parenthood actions, Professor Feldthusen observes:

The right of a woman, or a woman and her partner acting in concert, to make reproductive choices lies at the core of the involuntary parenthood action. Lord Bingham put it more broadly saying the mother's interest is "the opportunity to live her life in the way that she wished and planned." The involuntary parenthood action deals with the parents' claim to recover pecuniary damages they suffer as the result of negligently inflicted damage to their right to reproductive autonomy.¹⁰²

As Professor Feldthusen (and Lord Bingham) acknowledge, the result of the defendant's negligence in an action for involuntary parenthood is a woman's loss of the ability to live her life the way she had planned. I would suggest that it is the same result in an action in which the defendant's negligence takes away the plaintiff's ability to have a child. Traditionally, in either action, courts have been unwilling to fully recognize and compensate for the wrong done. This is why the *Wilhelmson* decision is so refreshing. By giving the plaintiff back the opportunity to have a biological child, Justice Sharma fully recognized the plaintiff's reproductive autonomy and compensated her for the loss of her ability to live her life as she had planned.

IV. "WHY NOT JUST ADOPT?"

Critics of the *Wilhelmson* decision have also expressed the sentiment 'why couldn't she just adopt?'¹⁰³ Commenters on several news stories covering the decision have expressed frustration at the 'vanity' of the plaintiff's desire to have a biological child and point out that there are countless parentless children in need of loving homes. This critique holds no ground and ignores the underlying reason that Justice Sharma made the award of surrogacy fees. The evidence showed that before the accident, the plaintiff had the ability to become pregnant and nothing suggested that she could not have carried a child to term and safely given birth. Expert witnesses testified at trial that due to the plaintiff's accident-related injuries, carrying a child would be a major risk to her wellbeing. In other words, the plaintiff had the ability to become pregnant and give birth to a biological child before the accident, and the defendant's negligence and the plaintiff's resulting injuries took this ability away from her. By awarding surrogacy fees, Justice Sharma gave the plaintiff back something that was taken away from her by giving her the opportunity to have a biological child via a surrogate.

While the plaintiff could hypothetically adopt a child, it is her choice alone whether that is the course of action she wishes to take. If she wants a biological child, her reproductive autonomy should be respected and she should be given that option. Justice Sharma

100 Rodgers, *supra* note 3 at 162.

101 *Ibid.*

102 Bruce Feldthusen, "Suppressing Damages in Involuntary Parenthood Actions: Contorting Tort Law, Denying Reproductive Freedom and Discriminating Against Mothers" (2014) 29 Can J Fam L 11 at 23.

103 See comments on Dickson, *supra* note 45.

recognized this in her decision and did not even entertain the idea that adoption would put the plaintiff back in her pre-accident position.

V. PHYSICAL VS. EMOTIONAL HARM

An aspect of tort law that has historically limited women's recovery is the seemingly neutral dichotomy between physical and emotional harm. As Professor Martha Chamallas demonstrates in many of her publications, there is a distinct hierarchy in tort law that privileges physical security and property over relationships and emotional security.¹⁰⁴ While restrictions governing recovery for emotional distress are set out in gender neutral terms, women tend to be negatively affected by this prioritization of physical harm over emotional harm.¹⁰⁵ This is largely because women tend to be associated more with the emotional harms that may be perceived as irrational responses to situations and not worthy of compensation. Professor Chamallas argues that the disparity in treatment between these types of tort claims is not a result of favoring male plaintiffs over female plaintiffs, but rather of rejecting or disfavoring the kinds of claims that women are more likely to bring.¹⁰⁶ While there may appear to be actual equality, I would argue that tort law lacks in substantive equality between male and female plaintiffs.

Tort law's failure to compensate women for serious emotional harms is clearly displayed in a historical survey of its treatment of fright-based physical injuries, a claim typically brought by female plaintiffs.¹⁰⁷ This is particularly evident in courts' description of women's suffering for the death or injury of their born or unborn child as "remote, unforeseeable, and unreasonable."¹⁰⁸ Women who experienced fright-based miscarriages suffered a type of bodily interference that was inappropriately described as an "injury from within."¹⁰⁹ Tort law's response to this type of harm was to categorize it as an "emotional disturbance" case,¹¹⁰ as reproductive injuries suffered by women were not yet recognized as part of the category of physical harm.¹¹¹ By labelling this type of reproductive harm as an "emotional disturbance," the law limited or refused recovery for female plaintiffs.

While courts now regard shock-induced miscarriage as a physical harm, recovery is not guaranteed.¹¹² Professor Chamallas argues that this disparity in coverage can largely be attributed to the difficulty many courts have with conceptualizing the distinct relationship between a mother and a fetus.¹¹³ The complicated nature of the response of a woman who experiences reproductive harm, such as a miscarriage or stillbirth, does not fall neatly into either the physical or emotional categories of tort law.¹¹⁴ As a result, many women who make claims in tort for reproductive harm are relegated to the realm of emotional distress, which often leads to limited recovery.

104 Martha Chamallas & Linda K. Kerber, "Women, Mothers, and the Law of Fright: A History" (1990) 88:4 Mich L Rev 814 at 814 [Chamallas & Kerber].

105 Martha Chamallas, "Unpacking Emotional Distress: Sexual Exploitation, Reproductive Harm, and Fundamental Rights" (2009) 44:5 Wake Forest L Rev 1109 at 1109 [Chamallas, "Unpacking Emotional Distress"].

106 *Ibid* at 1110.

107 Chamallas & Kerber, *supra* note 104 at 814.

108 *Ibid* at 816.

109 *Ibid* at 833.

110 *Ibid*.

111 Martha Chamallas, "Beneath the Surface of Civil Recourse Theory" (2013) 88:2 Ind LJ 527 at 535 [Chamallas, "Beneath the Surface"].

112 *Ibid* at 536.

113 *Ibid*.

114 *Ibid*.

Professor Chamallas contends that in some instances of female-specific harm, recovery is denied or the injury is not recognized because “no identical harm could be suffered by a man.”¹¹⁵ She gives the example of New York courts’ insistence, until a 2004 Court of Appeal case, that a female plaintiff who suffers emotional distress at stillbirth or miscarriage must demonstrate that she herself has suffered a physical injury “distinct from that suffered by the fetus and not a normal incident of childbirth.”¹¹⁶ Professor Chamallas suggests that the courts’ attempt to isolate a distinct injury to the mother, and deny compensation when this injury is not present, is an instance where courts refused to recognize a harm because no identical loss could be experienced by a male plaintiff.¹¹⁷

This dichotomy between physical harm and emotional harm is a large part of what has historically limited plaintiffs like Ms. Wilhelmson from recovering pecuniary damages for loss of fertility or childbearing capacity. Justice Sharma, more than many other judges who have seen this type of claim, recognized both the emotional and the physical nature of the harm suffered by the plaintiff.

A. Caps on Non-Pecuniary Damages

The plaintiff in *Wilhelmson* received the cap for non-pecuniary damages (\$367,000 in 2017). By awarding the plaintiff the maximum possible amount for non-pecuniary damages, Justice Sharma recognized the catastrophic effect of Ms. Wilhelmson’s injuries. They affected every area of her life, and in particular, the loss of her ability to have children was devastating.

Justice Sharma did not only acknowledge the plaintiff’s loss of reproductive capacity through it being a factor in the non-pecuniary damages award. She also gave the plaintiff \$100,000 for future surrogacy fees. If the plaintiff’s loss of her ability to have a child could only be recognized under non-pecuniary damages, she would have lost out on this award as she was already at the cap under this head of damages.¹¹⁸ Female-specific losses are generally undercompensated in tort law and often never get anywhere near the cap. However, in situations like that of the plaintiff in *Wilhelmson*, women are more negatively affected by a cap on non-pecuniary damages because women’s injuries are more often seen as emotional and intangible in nature.

Professor Lucinda Finley has developed this argument fully. She contends that the cap on non-pecuniary damages in many jurisdictions is problematic for women.¹¹⁹ Reasons for the cap on non-pecuniary damages include the arguments that they are “too subjective” and “inherently arbitrary,” as opposed to being truly compensatory.¹²⁰ Professor Finley points out that these rationales reflect the idea that intangible loss is “less real, less serious,

115 Chamallas, “Unpacking Emotional Distress”, *supra* note 105 at 1121.

116 *Ibid* at 1120.

117 *Ibid* at 1121.

118 The Supreme Court of Canada imposed a \$100,000 cap on non-pecuniary damages in a trilogy of cases decided in 1978 (*Andrews, supra* note 27, *Arnold v Teno*, [1978] 2 SCR 287, 83 D.L.R. (3d) 609, and *Thornton v School Dist. No. 57 (Prince George)*, [1978] 2 SCR 267, 83 D.L.R. (3d) 480). The rationale for this decision was that, as a matter of public policy, there should be a limit placed on the amount a plaintiff can recover for pain and suffering. The court held in *Andrews* at para 261 that the head of non-pecuniary damages is “open to widely extravagant claims. It is in this area that awards in the United States have soared to dramatically high levels in recent years.” The cap was \$100,000 in 1978, and is adjusted for inflation to determine the amount at the time of trial. The cap amount is typically considered appropriate to award only to the most grievously injured plaintiffs, including those rendered brain damaged or paralyzed as a result of the tortious conduct.

119 Lucinda Finley, “Female Trouble: The Implications of Tort Reform for Women” (1997) 64:3 *Tenn L Rev* 847.

120 *Ibid* at 851.

and thus less deserving of compensation harm claims.¹²¹ Part of what makes this position problematic and gendered is the fact that female-specific injuries are often considered non-pecuniary and hence not as deserving of compensation in the same way as tangible injuries. Further, women more often bring actions that are considered non-pecuniary in nature, such as emotional distress claims.

Prior to *Wilhelmson*, loss of reproductive capacity had almost exclusively been compensated under the head of non-pecuniary damages. Professor Finley argues that attempts to translate this type of injury into pecuniary loss terms is a challenge, as it fails to capture the devastation women feel from losing the ability to bear children in a “society that still sees childbearing as a woman’s highest calling.”¹²² Despite this process being wrought with difficulties, however, courts should strive to recognize the pecuniary loss associated with reproductive harm, as Justice Sharma did in *Wilhelmson*. Further, although the intangible aspects of injuries are far more difficult to quantify in a damages assessment, these harms often have a long-lasting and real impact on a plaintiff’s life that can be more significant than the physical and economic repercussions of the injury. It is important for tort law to recognize that non-pecuniary loss is just as real and worth redressing in a damages award as pecuniary loss.¹²³

B. Emotional Distress vs. Defamation

The physical and emotional dichotomy is one that seems to run parallel to that between the public and private spheres, and there does appear to be some inequality in the way courts have dealt with non-physical harm in the public sphere versus non-physical harm in the private sphere. An interesting example of this idea is the way courts have historically treated claims of defamation and compensation for reputational harm – claims more often brought by male plaintiffs. These are harms that arise predominantly in the public sphere and affect a person’s public image. When we take into account women’s limited participation in the public sphere until relatively recently, it is clear that defamation was initially a harm that most often affected men.

The law of defamation provides an avenue through which individuals may defend their personal or business reputation.¹²⁴ In *Hill v Church of Scientology of Toronto*, Cory J stated “a good reputation is closely related to the innate worthiness and dignity of the individual. It is an attribute that must, just as much as freedom of expression, be protected by society’s laws.”¹²⁵

There are two forms of defamation; slander refers to oral statements, and libel refers to statements with a permanent record, including social media posts, newspaper articles, and TV broadcasts.¹²⁶ For libel actions, a plaintiff does not have to prove damage in order to be entitled to compensation.

An interesting aspect of the history of defamation is the statutory provisions enacted in most common law jurisdictions that provided an action for slander for female plaintiffs in respect of statements that imputed adultery or unchastity to them.¹²⁷ At first glance, this cause of action may appear to have given women’s interests some protection and respect by the law. However, it is worth considering what is actually being protected by

121 *Ibid.*

122 *Ibid* at 856.

123 *Ibid.*

124 Thomas E. Brown, *Defamation Law: A Primer* (Toronto: Thomson Carswell, 2003) at 3.

125 [1995] 2 SCR 1130 at para 60, 1995 CanLII 59 (SCC).

126 Brown, *supra* note 124 at 10.

127 *Ibid* at 17.

this statutory provision. Since the protection only extended to statements that imputed adultery or unchastity to women, this cause of action arguably served to safeguard a woman's public persona that reflected on her husband or father, as opposed to the woman's own interests. This is further supported by the fact that at the time of these provisions, a woman could not have brought this action in her own name; her husband or father would have been the one making the claim. These statutory provisions provide another example of the law asserting control over women's bodies rather than protecting their bodily integrity and autonomy.

Kate Sutherland points out that that a defamation claim is easy to make and a challenge to refute.¹²⁸ It is essentially a strict liability tort; to establish a *prima facie* case of defamation, a plaintiff must only prove that the relevant statement was of a defamatory character, it referred to the plaintiff, and it was published.¹²⁹ The threshold for establishing that a statement is of a defamatory character is low in Canadian law, and the falsehood of the defamatory statement is presumed.¹³⁰ Additionally, damage is presumed once the plaintiff has established a *prima facie* case.

This relatively easy and uncomplicated process for establishing and compensating for defamation is in sharp contrast to the arduous process of obtaining damages in tort for emotional distress. An important distinction to make, which may largely explain why courts will compensate for defamation but often not emotional harm, is that defamation affects someone's reputation, which can cause true financial loss. For example, where a plaintiff runs a business and a defendant's defamatory statements cause the plaintiff's reputation to suffer, this may in turn cause the business to become less profitable. This is a genuine financial loss as a result of the defendant's actions, making damages more easily quantifiable.

However, one may still ask: why does the law extend higher protection to true economic loss and one's public image than other interests that predominantly affect women? Emotional or relational harms may often have a more severe, long-lasting impact on a plaintiff's life than reputational or financial loss. One of the major factors is likely that damages for these types of loss are more difficult to conceptualize and quantify. It is a challenge to isolate the different factors of emotional harm when they are happening in a plaintiff's mind, and as a result, calculating the extent of the injury is a complicated task.

VI. ARE THESE POLICY RATIONALES JUSTIFIED?

These moral discomforts and policy rationales have been seen as a justification for not fully compensating women for female-specific injuries. They are deep-rooted in tort law and often have the effect of limiting female plaintiffs' recovery for reproductive harm or other female-specific injuries. Unless there are legitimate policy reasons to justify non-compensation, these limitations on recovery often run contrary to basic principles of tort law. Professor Sanda Rodgers argues that even public policy reasons are often not enough to justify limiting women's recovery for interference with their reproductive autonomy. She contends that the idea of "public policy" gives courts leeway to "limit recovery to situations that conform to their own sense of what is right and appropriate."¹³¹ This concept is clearly expressed by Lord Steyn in *McFarlane*, when he states:

128 Kate Sutherland, "The Impact of the Tort of Defamation on Public Discourse about Racism" in Rodgers, Ruparelia & Bélanger-Hardy, *supra* note 3, 135 at 136.

129 *Ibid* at 135.

130 *Ibid*.

131 Rodgers, *supra* note 3 at 177.

Instinctively, [ordinary men and women] would consider that the law of tort has no business to provide legal remedies consequent... upon the birth of a healthy child, which all of us regard as a valuable and good thing...

. . . .

But judges' sense of the moral answer to a question, or the justice of the case, has been one of the great forces of the common law. What may count in a situation of difficulty and uncertainty is not the subjective view of the judge, but what he reasonably believes that the ordinary citizen would regard as right.¹³²

Courts ought to closely examine the public policy rationales that tend to limit women's recovery for female-specific injuries. If Lord Steyn's statement in *McFarlane* is any indication of how public policy rationales are used by a court, it is clear that many policy rationales are simply moral and ethical opinions in disguise. As we live in a society where women are subordinated, it is unsurprising that the views of the "reasonable person" contribute to that subordination in legal decisions.¹³³ Many policy rationales and ideas of what is moral and "right" that enforce the subordination of women are so deeply entrenched in society that they are not obvious on the surface. No matter how overwhelmingly judicial constructions of the reasonable person or of "public policy" represent the opinions and values of the popular majority, these should not restrict women's recovery for female-specific injuries.¹³⁴ Often, the reasonable person and public policy rationales reflect prejudicial attitudes towards women and their "proper role" in society, and in turn insufficiently compensate women for tortious harms they have suffered, particularly when it is reproductive harm.¹³⁵

Professor Emily Jackson addresses the question of when it might be appropriate to justify interference with reproductive autonomy. She argues that John Stuart Mill's "harm principle" may be a useful model on which to base the weighing of competing procreative choices and interests.¹³⁶ The harm principle essentially states that power should not be exercised over the will of an individual unless such will would cause harm to others or infringe someone else's ability to exercise his or her rights and freedoms.¹³⁷ An individual cannot have power exercised over her against her will simply because it appears to be wise or right. Jackson gives the example of a woman who wants to undergo an abortion, but whose partner wants her to carry the child to term. The partner cannot have his wishes respected unless the pregnant woman's freedom is undermined, and she cannot exercise procreative self-determination without disregarding her partner's preference.¹³⁸ In an assessment of how to resolve this conflict, Jackson argues that the party whose bodily integrity is at stake should have her right to self-determination given the most protection.¹³⁹ In my view, this is the correct approach to take in a balancing of interests. A woman should not have to be subjected to pregnancy and childbirth against her wishes simply because of her partner's preference.¹⁴⁰

132 *McFarlane*, *supra* note 83 at 997.

133 Rodgers, *supra* note 3 at 178.

134 *Ibid.*

135 *Ibid.*

136 Jackson, *supra* note 69 at 320.

137 John Stuart Mill, "On Liberty" in John Gray & G.W. Smith, eds, *On Liberty In Focus* (London, UK: Routledge, 1991) 21 at 30.

138 Jackson, *supra* note 69 at 320.

139 *Ibid.*

140 *Ibid* at 321.

The definition of “harm” should not include mere moral offence, disgust or societal disapproval, as such an interpretation would “undermine the whole purpose of the harm principle, which is in essence, to introduce a presumption in favour of individual self-determination.”¹⁴¹ As Professor Jackson argues, an individual or society’s sense of morality should not place a limit on another person’s personal autonomy and ability to make reproductive choices according to her own values.¹⁴² Further, many of the concerns that are seen to justify limitations on women’s reproductive autonomy, such as the commodification anxiety, are largely speculative. There is little evidence that fully compensating women in involuntary parenthood actions would result in the commodification of children, or that legalizing commercial surrogacy would exploit women or create a baby-selling market. The various rationales for limiting the reproductive autonomy of women often rely on feelings or intuition, rather than documentary evidence.¹⁴³ However, the right to make decisions about one’s own body and reproductive capacity is of such significant importance that anxiety about hypothetical risks should not justify placing limitations on reproductive autonomy and the ability to fully recover in tort actions for female-specific injuries.¹⁴⁴

CONCLUSION

Justice Sharma’s decision in *Wilhelmson* was precedent-setting in its award of future surrogacy fees under cost of future care. In giving the plaintiff back the ability to have a biological child, Justice Sharma recognized the plaintiff’s reproductive autonomy and fully compensated her for the loss she had suffered, as far as money could do. However, Canadian tort law has often denied or limited the compensation of female plaintiffs for reproductive harm and other female-specific injuries, citing rationales such as the commodification anxiety and the inherent difficulties in quantifying these harms. Many of these arguments are contradictory and hold little ground. For example, the law routinely provides financial compensation for other harms that seem to value human life without the commodification concerns that are present in cases of reproductive harm.

While courts have historically undercompensated women for reproductive and emotional harms, I would argue that for the most part this failure has not been a product of intentional bias against female plaintiffs or women in general. Instead, I think that courts have legitimately had, and continue to have, difficulty conceptualizing reproductive and emotional harms and the damages that should flow from these types of injuries. In particular, the unique nature of reproductive harm such as miscarriage or loss of childbearing capacity makes it exceptionally difficult for courts to sufficiently compensate plaintiffs who experience such harms. More-so than most injuries, reproductive harms have intertwined physical, emotional and relational elements that do not fit neatly into the categories of harm set out in tort law. The binary nature in which tort law categorizes harm as either pecuniary or non-pecuniary makes little room for claims of reproductive harm and other female-specific injuries.

Despite these difficulties, there should be a responsibility on courts to strive to apply the principles of tort law consistently to male and female plaintiffs. As Kate Sutherland observes, the judiciary has historically been predominantly male.¹⁴⁵ This results in an “experiential gap which must be bridged in some measure if legal decision-makers are to empathize with plaintiffs in these cases, and to bring that empathy to bear on the

141 *Ibid.*

142 *Ibid* at 322.

143 *Ibid.*

144 *Ibid.*

145 Kate Sutherland, “Measuring Pain: Quantifying Damages in Civil Suits for Sexual Assault” in Ken Cooper-Stephenson & Elaine Gibson, eds, *Tort Theory* (North York, Ont: Captus Press, 1993) 212 at 212-213.

assessment of damages once the injury has been established.”¹⁴⁶ A predominantly male judiciary that likely continues to be informed by male-dominated values will inevitably have difficulty fully appreciating female-specific injuries or injuries that mostly affect women.

Upon an examination of feminine experiences in tort law, there is evidently a structural inequality in the law that results in women being undercompensated for serious and recurring injuries. This is a consequence of these harms often being classified as emotional or relational—interests that are given far less respect than physical security or property. In assessing harms that tend to be suffered by women, I think courts will need to keep an open mind to unconventional remedies that will offer true compensation to plaintiffs for the loss they have suffered. To gain positive outcomes for plaintiffs who have suffered reproductive harm or other female-specific injuries, the legal system should recognize the various ways in which harm manifests in the lives of injured persons and fully compensate them for their losses. This will require an appreciation that these harms are as serious as physical harms.

The *Wilhelmson* decision should be applauded for awarding the plaintiff damages that fully reflect her losses from the accident, including reproductive incapacity, and attempting to restore her to the position she would have been in but for the accident. This award may seem unusual or even inappropriate to some. However, it is only with such a remedy that the plaintiff can be appropriately compensated for the loss she has suffered, and tort law can achieve a measure of substantive equality for plaintiffs who suffer harms that have hitherto been ignored or undervalued in the system of accident compensation.

146 *Ibid* at 213.