Another Whack for Raped Women: Co-option of the Ontario Criminal Injuries Compensation Board by the Criminal Justice System, Publication Bans, Adjudicator Problems and Gendered Legal Solutions for the 21st Century.

by

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A Thesis submitted to
the Faculty of Graduate Studies and Research
in partial fulfillment of
the requirements for the degree of

Master of Arts

Department of Law
Carleton University
Ottawa, Ontario
July 28, 2004

Your file Votre référence
ISBN: 0-612-98980-1
Our file Notre référence
ISBN: 0-612-98980-1

Abstract.

This paper exposes the co-option of the Ontario Criminal Injuries Compensation Board (Board) by the Criminal Justice System (CJS). We look at Board decisions never before examined to show how adjudicators often use the wrong burden of proof, have no expertise on sexual violence, do not critique the evidence it demands from the CJS and show how this impacts claims submitted to them by many raped women. The Board has historically managed to keep its decisions on rape claims a secret by imposing private hearings and unsolicited blanket paternalistic publication bans. We show in this paper why the Board, its enabling legislation and its policies are overdue for reform and also look at how privacy can be used to pervert feminist goals.

Dedication.

For Kassandra

Acknowledgments.

Warm thanks go to Professor Diana Young who gave me valuable assistance, direction, supervision and not only actively engaged with my work, but cheered me on. Thanks so very much, Diana! Warm thanks also go to my second reader, Professor Dianne George who provided advice regarding my work and hung in there when the going got tough. I will miss both of you – dearly.

I owe thanks to Professor Virginia Caputo of the Pauline Jewett Institute of Women's Studies at Carleton University who helped me understand the injustices towards women, with her very first lecture. I am indebted as well to Professor T. B. Dawson of the Law Department at Carleton University for refereeing my graduate application. A large portion of gratitude goes to a very special man, the Chair of the Law Department at Carleton University, Professor Peter Swan who also refereed my graduate application, egged me on, made me laugh and did not take me seriously when that is exactly what he needed to do. Smile Peter, it's over. I will miss you!

Thank you to Professor Amy Bartholomew, Graduate Supervisor for patiently listening to my woes. Thank you to Andrew Squires, the Graduate Administrator who doubles up as my hero, for helping me navigate the "rules" relating to graduate studies. Thanks go to Barbara Higgins, who was always willing to help and with a smile. There are many others from Carleton University's Law, Sociology, English and Women Studies departments who helped me in one fashion or other. The foregoing include but

are not limited to Dr. George Rigakos, Dr. Allan Hunt, Dr. Logan Atkinson, George Pollard, Dr. Barry J. Wright, Dr. Andrea Doucet, Dr. Karen March, Dr. Sandra Campbell, Dr. L. Pauline Rankin and Professor Kevin Gildea. Thanks go to the Faculty of Graduate Studies, Mr. Bryant Greenbaum formerly of the Criminal Injuries Compensation Board of Ontario, Mr. Murray Selinger of the Attorney General's office in Manitoba, to the various legal feminists at Ottawa University, to Josephine of the Rape Crisis Centre of Ottawa and to the various anti-violence, legal and academic community activists working hard to eliminate gender disparities inherent in legal mechanisms and elsewhere else. What a job! I thank too an anonymous lady in Albury, NSW who shared her pain and perspective about her rape and who is working hard to eradicate rape and bring the collective scream of raped women into the public sphere.

On a personal level, I thank each person who brought light and laughter into my life during this enormously difficult and emotional undertaking - especially in mid-2003 when my father passed away. I thank my incredibly beautiful daughter, Kassandra who is about to make me a grandmother, again and my son eldest son Marko. Both have recently decided to return to school! Woohoo! Go kids, go! Thanks go to my middle child, Patrick for believing in his mother. Thank you to my sister Patricia Marchand, who cheered me on, debated the problems of life with me and helped me with proofreading assistance. Thanks to Muhammad G. Nuraddeen, who provided me with a vehicle and personal encouragement throughout my stay at Carleton as he's been there, done that. Thanks go to Johanne Gagnon, a very special friend, for her encouragement

and technological assistance. Thanks go to my personal health care practitioner Nora McBean who made sure I remained healthy and thanks go to my peer Cathia Riley who told me not to quit! Thank you to Chris J. Irwin for his assistance at the Board and providing me some of the fuel necessary for me to keep at it. I also thank my siblings Suzanne Charnley of Ottawa, Jeannine Marchand of Gananoque, Pierre Marchand of Edmonton, AB and Paul Marchand of Mississauga for motivating me to reach my goal.

I would like to thank five other special people. Mr. Michael C. Provan and Mr. Fraser McVie both of the Correctional Service of Canada, Mrs. Rita Marchand of Cornwall, ON and regrettably and posthumously - my parents special thanks to Mrs. Huguette Sauriol and Mr. Patrick Marchand. Each of these five individuals helped instil within in me, a sense of duty towards others or the confidence to achieve whatever I make up my mind to undertake. Finally, many thanks to the legal scholars at Ottawa University, the anti-violence workers all over the world, PAR-l and the Survivors who have shared their experience. Without your voices - this paper would not be possible.

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Chapter I – Nuts & Bolts

Introduction.

Throughout this thesis, we will discuss selected issues within the CJS found in the Board's work. We will show how the Board is using discriminating tools, processes and decisions originating from the CJS when it adjudicates gendered violence claims. All too often Board decisions reflect the same sexist problems found within the CJS that many raped women have chosen to abandon rather than face the re-victimization issues which are part and parcel to using it. The Board disregards the special nature of sexual assault crimes and no matter how often that fact has been brought to its attention, the Board has refused to budge.

While the Board's enabling legislation is problematic, so are many of the adjudicators appointed under it. Far too many Board Members have had careers in the CJS and either cannot or will not critique anything that flows to them from it. Some adjudicators have no legal background and no specialized knowledge on sexual assault issues. While this may not be a problem for other types of crimes, it is when the crime involves sexual violence, and the Board's workload includes a large number of applications due to gendered sexual violence occurrences. The Board's enabling legislation requires adjudicators to consider a victim's contribution to their injuries.[1]

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[1] *Compensation for Victims of Crime Act*, R.S.O. 1990, c. C.24, as am. by 1999, c. 6, s. 11; 2000, c. 26, Sch. A, s.4 [hereinafter *Compensation Act*] at s. 17.(1): "In determining whether to make an order for compensation and the amount thereof, the Board shall have regard to all relevant circumstances, including any behaviour of the victim that may have directly or indirectly contributed to his or her injury or death."

When the crime is sexual, women can be made responsible for it by adjudicators who do not do a contextual interpretation of the legal instrument that informs their work. The Board is not required to consider the nature of sexual assault in the context of violence against women in Canada or analyze any of the information coming to them from the CJS. However, there is a consensus in legal and feminist academia that the CJS is rife with systemic problems for Survivors because of the law itself, the decision-makers' discriminatory attitudes and the policies in place to address sexual assault complaints. The Board sometimes bases its decision that a crime of violence did not occur by relying on the same myths that influenced decision-makers who processed the complaint in the CJS. For example, we see the Board deny compensation to Survivors who drank alcohol, consumed recreational drugs, wore certain clothes, took risks, did not report the rape, or had some details about the rape mixed up. The Board finds many such Survivors not credible, reliable or consistent. Although several years may have elapsed between the assault and the Board hearing, adjudicators will compare statements the Survivor made in her initial compensation application to previous statements she or others had made or written about the occurrence and even her character. A raped woman's character and mental health is often an issue at the Board. Adjudicators use rapists' or other hostile statements to decide her claim and oftentimes give more credibility to Alleged Officers than they give the Survivor. Board hearings are often adversarial rather than victim-centered. Moreover, when a police officer "unfounded" a rape complaint, or a Crown Attorney decided to not prosecute, or a judge or jury acquitted, the Board has an automatic reaction and will often deny his victim an award, though sometimes they

believe the rape may have happened.

If the above were not bad enough, the Board makes Alleged Offenders parties to Survivors' hearings and hand over some of the contents of the Survivor's file to him or his legal representative which has at times resulted in an Alleged Offender finding out his victim's name and address change. The practice of disclosing evidence to an Alleged Offender in this way reflects concerns that are more properly part of the criminal law process and should not be imported into Board procedures because the Board should be more victim-centered. Because the Board makes alleged rapists parties, many Survivors are now abandoning their claims though many have no other way to seek justice. Throughout my research it became clear that if the CJS was involved and decisions made within it did not result in a conviction, Survivors would also be denied compensation at the Board, no matter how often adjudicators wrote and rewrote that no conviction is necessary to find someone to be a victim of violent crime. This thesis will show why the Board can be a toxic place for Ontario Survivors.

Organization.

The rest of this Chapter will explain the methodology used for this paper, the research purpose, the research difficulties and define terms used within it. Chapter II looks at the Board, its enabling legislation, and history. We look at the Board's mandate, procedures, appointment process, the role of the Office of the Attorney General of Ontario, the Chair's responsibilities and consider adjudicators' biographical data. We will also consider the critiques and suggestions made about administrative appointments in general, the training available to the Board's adjudicators and discuss doctrine, heads

of damages, party difficulties, Board and Canadian facts and statistics.

Chapter III gives an overview of selected issues that impact Survivors in criminal, civil, administrative law. It also reviews one alternative dispute resolution agreement. It also looks at decision-making powers of officials working within the CJS, i.e., police officers, lawyers, Crown Attorneys, jurors, judges and medical personnel. We look at relevant case law and some of the warnings issued by the Supreme Court of Canada regarding relying on mythology to make decisions about Survivor complaints.

Chapter IV starts with an examination of three appealed Board decisions and then we move on to an analysis of fifteen never before released Board decisions. In Chapter V, we look at what an Australian group of Survivors is doing about their rapes and we examine what many Ontario Survivors sought from law, what they got and how they viewed their experiences with them. The paper concludes with a ten-part suggestion for legislative and Board reform.

Methodology.

The Internet as well as traditional sources of information was relied upon to research this paper. The author conducted both a primary and a secondary literature review, which included case law, books, academic journals, and statutory instruments. Board reports, its policies, procedures, decisions, appeals were reviewed as was legal commentary and selected Federal, Provincial, American, British and Australian materials. There was communication with academics and stakeholder representatives, at home and abroad, revolving around sexual assault and criminal compensation issues. The writer surveyed newspapers and attended the Board's offices, in Toronto. Because of the

Board's initial refusal to cooperate with me, the privacy legislation led to my successful appeals and the Board eventually sent me some of its severed files.[2] I obtained forty-six of the Board's decisions in which the decision made by adjudicators was to deny compensation. Thirty of these had publication bans and secret hearings were imposed by the Board. The methodology includes a qualitative analysis on fifteen of the Board's secret decisions, and a brief description of the other thirty-one decisions.

I selected the fifteen decisions because they each had a multiplicity of problematic issues within them. These decisions are cited to provide examples of how the discriminatory practices that taint sexual assault prosecutions in the CJS are replicated in Board proceedings. Discriminatory practices and attitudes among CJS decision-makers have been documented by both case law and empirical research. Finally, I discuss the only research ever conducted on Survivors who sought compensation at the Board, in civil law and under one alternative dispute resolution mechanism created for just them.

Purpose & Problems.

My research purpose was to find out whether there is a relationship between the myths and stereotypes informing processes and decisions made in the CJS and those made on Survivor applications at the Board. My interest in doing research in this area was piqued by when I heard a number of disturbing allusions to experiences that Survivors had before the Board, during my participation at a feminist legal conference.

I encountered a number of difficulties in conducting my research for this thesis.

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[2]Information and Privacy Commissioner/Ontario, Order PO-2124, Appeal PA-030057-1, online: http://www.ipc.on.ca/scripts/index_.asp?action=31&P_ID=14139&N_ID=1&PT_ID=273

For example, I knew my first step was going to be the most difficult as I would need access to carefully guarded Board decisions that were subject to publication bans. All hearings are supposed to be held in public, and we discuss how that is not the case when the crime is sexually related and the victim is female. The Board's enabling legislation confers broad discretion on it to impose publication bans on proceedings, providing simply that the Board may impose such bans when it considers it necessary to do so. The Board's enabling legislation contains no specific criteria with respect to publication bans.[3] However, it does direct that the Board

> ... *have regard to the desirability of permitting the public to be informed of the principles and nature of each case.*[4]

The Board fulfills this obligation by summarizing some of the claims in its Annual Reports, sometimes providing much detail, sometimes providing little.

When I asked to see files relating to sexual assault cases, the Board's informal answer was no. I had to submit an Access to Information request under the *Freedom of Information and Protection of Privacy Act*.[5] In January 2003, I requested three years of denied Board Orders that related to women who alleged a gendered violence occurrence. Since I knew that the Board guarded the privacy of the women, whether anyone asked it to do so or not, I requested was that all decisions be severed of all personally identifying information. I waited, and waited. It was not without persistence that the request was

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&U_ID=0 (date accessed: 5 July 2004).
[3] *Compensation for Victims of Crime Act*, *supra.* note 1 at s.13.(1).
[4] *Ibid.* [emphasis added]
[5] R.S.O. 1990 , c. F-4 [hereinafter *Privacy Act*].

eventually to meet limited success. This paper could not have been done without the *Privacy Act*[6] obligating the Board to release to me a limited number of their decisions.

Before leaving this section, we need to highlight the paper's limitations. The most serious limitations were in obtaining a bigger sample and that was due to publications bans arbitrarily imposed at the Board on all files pertaining to the subject of the sexual assault of adult females in Ontario. As such, a quantitative analysis of Board Orders was not possible. The author offers a qualitative analysis of fifteen Board Orders, which have been released for the first time in the history of the Board.

Terminology.

Alleged Offender(s)

One or more non-convicted men accused of a rape.

Gendered Sexual Violence

This phrase means one or more sexual crimes done to women because or their gender. One or more men do it to them.

Myth

An involuntary collective statement based on an unconscious psychic experience.

Offender(s)

One or more men convicted of one or more crimes.

Privacy

The claim of individuals to decide for themselves when, how and to what extent information about themselves is to be made available to others.

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[6] *Ibid.*

Rape or Sexual Assault

These terms are used interchangeably. They mean what we have historically described as a rape or what we currently describe in Canada and abroad under a variety of sexual crime headings, in criminal law.

Survivor(s)/Applicant(s)/Claimants

These terms are used to describe one or more adult women who pursued judicial redress due to a gendered crime.

Chapter II - Ontario Criminal Injuries Compensation Board

Introduction.

The Board's enabling legislation is the *Compensation Act.*[7] Under it, the Board is a corporation and it must be composed of no fewer than five members.[8] Members are appointed by the Lieutenant Governor in Council and while one Member is appointed Chair, one or more become Vice-Chairs.[9] The Board makes decisions on applications for criminal injury compensation and must prepare and publish a summary of its decisions and reasons for them, periodically. [10] None of the Board's decisions are reported in any law reporter. Compensation is paid out of the money appropriated for that purpose by the Ontario Legislature and whatever money is reimbursed is paid to the Consolidated Revenue fund.[11] The Board's enabling legislation outlines the types of injuries that are compensable and the Board has the discretion to consider who can have compensation and how much to award.[12]

Though "[w] e cannot define the path along with every tribunal which has to determine complex social questions must walk...we can keep them from turning in certain directions which are known to lead away from the promised land of justice."[13] In this Chapter, we will be examining selected areas of the Board's enabling legislation, policies and procedures, adjudicator appointments, training and look at some of the

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[7]*Compensation for Victims of Crime Act, supra* note 1.
[8]*Ibid.* at s.3(1).
[9]*Ibid.*
[10]*Ibid.* at s.4.
[11]*Ibid.* at s.27.(1)(2).
[12]*Ibid.* at s.7.(1).
[13]William A. Robson, *Justice and Administrative Law: A Study of the British*

critiques made on those issues. We will introduce some facts and statistics about the Board and the gendered violence experienced by women in Canada.

Board Mandate.

Though the Board's official mandate or mission statement is nowhere to be found, we know it is supposed to compensate victims of violent crimes that happened in Ontario. How decisions are made will depend on which adjudicators are assigned to hear an application. While the Board's function is to provide compensation, in all of the cases released to me, it applied standards that appeared arbitrary.

Attorney General of Ontario.

The administrative responsibility for the Board falls to the Office of the Ontario Attorney General. (Office).[14] The Attorney General is Minister and Chief independent legal advisor to the Cabinet. As Cabinet Minister, the Office assumes responsibility for representing the interests and perspectives of the Ministry at Cabinet. The Attorney General must also represent the interests and perspectives of Cabinet and the Ontario Government to the Office's Ministry and communities of interest. The Minister must table the Board's activities to the Ontario Parliament. He/she can send a representative to attend Board hearings.[15] The Office's main business is in prosecuting individuals alleged to have committed crimes against the State and allegations often come from victims who make complaints to the police. The Office's interest in supporting Survivors

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Constitution, 3rd edition, (Connecticut: Greenwood Press, 1970) at 409.

[14]*Compensation for Victims of Crime Act, supra* note 1 at s.2.

[15]*Ibid.* at s.9.(1)(b): "When an application is referred under section 8 the Board shall fix a date, time and place for the hearing of the application and shall, at least 10 days before the hearing date, have notice of the date, time and place served on, (b) the Minister;".

is in securing their cooperation as witnesses. The Office also has an interest in supporting the police's point of view because a lot of its work flows from the police's "founded" reports. Getting the police involved, doing whatever the Office's employees tell Survivors to do, obtaining reports from those who work in this Office is so important that without them, the Board can refuse to consider an application.[16]

While the Office is responsible for the administration of the Board, it also refers applications to the Board from potential adjudicators. Many of the Board's present complement of adjudicators have worked for this Office as Crown Attorneys, judges, and lawyers or as the former Minister. The Office employs the Freedom of Information Coordinator who decides Access to Information Requests regarding information held by the Board. The fact that many Board Members have worked for the Office as does the Freedom of Information Coordinator gives rise to a possible conflict of interest situation. That possibility is strong given much of the material, processes and testimony generated by the Office is not only relied upon by the Board, but, as mentioned earlier, the Board can refuse to decide an application without it. Finally, because of its enabling legislation, the Board is required to consider a Survivor's contribution to her rape, and through it, adjudicators are invited to consider myths about rape, raped women and rapists.[17] The legislation also authorizes adjudicators to refuse or reduce an award if a Survivor has refused to cooperate or failed to report the offence to the police.[18] Whatever is decided in

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[16]Criminal Injuries Compensation Board, *Guidelines for the Public*,Toronto, ON, 2002 at 3.

[17]*Compensation for Victims of Crime Act, supra* note 1.

[18]*Compensation for Victims of Crime Act, supra* note 1 at s. 17.(2): "The Board may, in its discretion, refuse to make an order for compensation or order a reduced amount of

the CJS will deeply influence Board decisions and we see many examples in Chapter IV.

Chair Responsibilities.

The Chair has supervisory duties over adjudicators and staff. The Chair directs all the Board's affairs and decides what type of hearings, what type of panel and which adjudicator is to be assigned to Survivors hearings.[19] Assigning hearings is not dependent on an adjudicator's expertise, but rather on who is available. The Chair must report the Board's activities to the Attorney General and can designate a Vice-Chair to exercise the powers and perform the duties of the Chair's position, if unable to act or if he/she must be absent.[20] The Chair is responsible for the development of the criteria to be considered for the selection of adjudicators, for selecting them and for all the Board's policies and procedures. The Chair does not appear to adjudicate claims for compensation, at all.

Applications.

To obtain an award for compensation, Survivors must apply. This means they must know the Board exists. The Board does not promote its program and potential applicants using the Internet will find no Website for the Board. Information about the compensation scheme can be found though on the Ministry of the Attorney General's website.[21] Victims of crime often find out about the Board's existence by happenstance

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compensation where it is satisfied that the applicant has refused reasonable co-operation with, or failed to report promptly the offence to, a law enforcement agency."

[19] *Ibid.* at s.3(3).

[20] *Ibid.* at s.3.(4).

[21] Ontario, Ministry of the Attorney General, online: http://www.attorneygeneral.jus.gov.on.ca/english/about/vw/cicb.asp (last modified: 20 December 2002).

and some never find out at all. Less than a decade ago, because of public hearings held in Toronto before the full Committee on the Administration of Justice, several government officials, academics, victims, and victim groups came forward and pointed out that there is "...still room for improvement in the provision of information, support services and compensation to victims."[22] The Committee wrote, "[b] ased on the evidence presented to the Committee, it is apparent that many victims of crime are unaware of available victim support services and are unaware of the right to apply for compensation from the CICB."[23] It made many recommendations. One recommendation was that a victim information package be provided to all victims of crime and their families as a matter of right. The recommendation received no action. "In the view of the Committee the real issue here is whether the CICB exists simply to provide symbolic compensation to victims to make them feel they received at least some recognition of their suffering, or whether it exists to provide compensation to victims for their actual injury or loss."[24] A former Chair at the pubic hearings commented on the Board's failure to meet the needs of young permanently disabled victims. The Chair stated their program is "... not welfare and we can't be everything to all victims..."[25]

For Survivors who find out about the Board, their first step can be their last. Whether an individual can even apply for compensation can depend on what the Board's

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[22]Ontario, Legislative Assembly, Standing Committee on Administration of Justice, "Report under Standing Order 125 on victims of crime"(1993). ISBN 0-7778-1534-6 at 5.
[23]*Ibid.* at 7.
[24]*Ibid.* at 12.
[25]Wendy Calder, former Chair, Criminal Injuries Compensation Board, Toronto, ON, see Ontario, Legislative Assembly, Standing Committee on Administration of Justice, *Hansard: Official Report of Debates*, 35th Parl., 3rd Session (8 June 1993): J-82.

front line employee decides after a Survivor initially discusses the circumstances surrounding her claim. After hearing some of the details surrounding a rape, a Board employee might decide to send a caller an application.[26] The employee's decision will depend on whether she or he determines the victim has the right to apply. The Board claims these particular employees are highly trained and have "...an excellent reputation for treating all callers with dignity, sympathy and respect."[27] Rather than adjudicators deciding on verbal applications, it can be Board employees making decisions. While the Board might be reducing its caseload this way, its employees may be eliminating people who have legitimate claims from having the benefit of an adjudicator from ever hearing them. When an employee decides a Survivor is entitled to apply, a gender-neutral application will be mailed and once completed must be returned and must include whatever documentation the Board demands. Applicants must normally submit applications for compensation within two years of the injury or death but the Board may accord extensions depending on what evidence is available.[28] This may be extremely difficult for cases of historical rape.

> The granting of a request for an extension to the limitation period is an exercise of the Board's discretion. Almost inevitably there may seem to be discrepancies in the exercise of the Board's discretion as this is applied by the Chair or his delegates. The operative factors influencing the Board to exercise its discretion and grant an extension

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[26]Telephone conversation with Markella Giannaros, Claims Service Representative Criminal Injuries Compensation Board, Toronto, ON, December 11, 2003.
[27]Criminal Injuries Compensation Board, *29th Annual Report: April 1, 2001 to March 31, 2002*, (Toronto: 2002) at Table 7.
[28]*Compensation for Victims of Crime Act, supra* note 1 at s.6: "An application for compensation shall be made within two years after the date of the injury or death but the Board, before or after the expiry of the two-year period, may extend the time for the further period it considers warranted."

> are not so much the stated facts in the request. What the Board is most concerned about are indications of a likelihood that evidence to confirm that an act of criminal violence took place and that injuries, which can be related to that act, is or will be available. The denial of an extension request is not a denial that the acts in question took place. It represents a decision on the part of the Board that the evidence available or likely to be available is not sufficient for the Board to make a determination whether or not the act(s) took place. Should further evidence become available later, a new request may be made to the Board.[29]

The responsibility for the outlay of cash to pay for the documents the Board requires is initially borne by the Survivor. "Invoices should be mailed directly to the Board along with the records and reports."[30] However, the Board can award an interim award to cover the costs but the victim must know to apply, submit an application for costs and the Board must then decide to grant it.

Party Definitions.

The Board notifies Alleged Offenders of hearings. It could not tell me how many Alleged Offenders show up.[31] By notifying perpetrators, the Board makes them parties to hearings and are then entitled to some of the information about his victim, contained in the Board's file. This can include name and address changes and the names of the counselors and medical personnel she has consulted.

> In addition, given that control is an issue in many forms of violence against women, knowing that their assailant has access to the

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[29]Letter to Darlene LeBlanc, Sexual Assault Network, Regional Coordinating Committee to End Violence Against Women, Ottawa, ON, September 27, 1996, from Mary Lee, Registrar/Manager of Administration, Criminal Compensation Board, Toronto, ON at accompanying attachment entitled *Comments on the Report and Recommendations to the Criminal Injuries Compensation Board Provincial Workshop, March 1996* at p. 7.

[30]*Supra* note 16.

[31]Letter from Bryant Greenbaum, former Executive Assistant to the Chair, Criminal Injuries Compensation Board, Toronto, ON, February 18, 2003.

> information about the application in her file is particularly abhorrent to many survivors. The Board's blanket policy of notifying the offender shows its failure to recognize the safety risk it poses to applicants. This in turn reflects a lack of understanding about the power of the perpetrator's wish to control his victim. The potential for retaliatory violence in wife abuse cases is great, as is made clear by the number of women who are assaulted by their partners after the women leave the relationship.[32]

While we will see later that researchers are not privy to information regarding Survivor files due to publication bans or even the decisions made on their applications, men who are alleged to have prompted the application have such entitlements because the Board refuses to stop making them parties. Some Survivors went to their hearings only to find out at the last moment that material had been added to the Board file - without her knowledge.[33] Making an Alleged Offender a party means he also has cross-examination rights which can make Board hearings confrontational and adversarial instead of pro-victim and informal. During cross-examination, an alleged rapist can bully his victim, depending on whether the Board intervenes or not. If there is no intervention, the Survivor can be obligated to symbolically submit to him again and this can recreate some of the dynamics that were present in the sexual assault.

Sometimes, because of policies in place at the Board, adjudicators seem more concerned with the credibility and culpability of the victim, than giving them awards. This seems to be one of the reasons why Alleged Offenders are invited at hearings, albeit it is not the only reason. By focusing on Survivors' credibility and culpability,

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[32]*Options and Access for Survivors of Violence*, Criminal Injuries Compensation Board Provincial Workshop, Criminal Injuries Compensation Board, Toronto, ON and the Sexual Assault Network, Ottawa, ON, March 23, 1996, Speaker's Notes, Lori Pope at 3.
[33]*Ibid.* at Action Plan and accompanying text.

adjudicators might be blaming Survivors for the very thing they have survived.[34] The Sexual Assault Network (SAN) has pointed out that the Board's notification policy is particularly problematic for Survivors and the practice should stop.[35] Feldthusen's team recommended that the Board rethink its policies that require Survivors to have to face Alleged Offenders at hearings.[36] Though the Board changed its policy on notifying convicted men, it also simultaneously "...waived its right to subrogation in all applications on which a notice of hearing was not sent on the basis of this new policy."[37] The latter may be because the Board is afraid of being sued.[38] We discuss this, below.

The Board's enabling legislation is clear that the Board should notify perpetrators if doing so is practicable.[39] Notification is therefore optional and depends on what the Board determines might be practicable. Though the anti-violence community has been trying to work with the Board in order for it to stop notification, in 1997 the former Chair delegated the task of having its policy changed back to the anti-violence community, by suggesting that they lobby the government and if successful, the former Chair promised

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[34] *Ibid.* at 2.
[35] *Ibid.* at 8.
[36] B. Feldthusen, O. Hankivsky & L. Greaves, "Therapeutic Consequences of Civil Actions for Damages and Compensation Claims by Victims of Sexual Abuse" (2000) 12:1 C.J.W.L. 66 at 109.
[37] Memorandum to C.I.C.B. Stakeholders *Recent Changes to Criminal Compensation Board Policies and Procedures* from Sharon Rosenfeldt, former Chair, Criminal Injuries Compensation Board, Toronto, ON, March 16, 1998 at 1.
[38] Letter to Gullen, Joan, Chair, Sexual Assault Network, Regional Coordinating Committee to End Violence Against Women, Ottawa, ON, from Chisange Puta-Chekwe, former Chair, Ontario Criminal Injuries Compensation, Toronto, ON, September 11, 1995 at 1.
[39] *Compensation for Victims of Crime Act, supra* note 15 at ss.(c).

to cover the anti-violence community's costs involved.[40] This is odd given the Board has already changed its policy on notification, several times. For example, before 1987, the Board had decided not to notify Alleged Offenders depending on the applicant's circumstances. In November 1987, the then Chair directed that a notice would be sent to all those who had not been charged or convicted. Two years later, the next Chair ordered that all perpetrator notification stop in cases of sexual assault. In the spring of 1995, another Chair decided to notify both those convicted and not convicted of sexual assault. However, recently the Board has claimed it cannot change its policy on notification because it is vulnerable to a legal challenge if it does not notify the Alleged Offenders identified by Survivors as being responsible for their sexual assault.[41] Because my research has not found one case in which the Board was sued by an Alleged Offender, the issue of vulnerability to litigation appears moot.

Since Alleged Offenders can only be a negative presence at the Board for the Survivor and because of their right to attend some Survivors are now refusing to submit claims or are abandoning claims already submitted.[42] The Alleged Offenders' presence can be responsible for many Survivors' freezing, becoming emotional or being unable to recall events properly and when the foregoing happens the Board may decide she is inconsistent, not credible, or unreliable rather than see her behaviour in relation to his presence. The latter happens because it appears that most adjudicators have no expertise

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[40]*Notes from Meeting,* Criminal Injuries Compensation Board, Toronto, ON and the Sexual Assault Network, Ottawa, ON, January 24, 1997 at 1.
[41]*Supra* note 38 at 1.
[42]Andrée Côté, *Sexual Assault Network: Interim Report, Options & Access for Survivors of Violence: Criminal Injuries Compensation Board Provincial Meeting II, Progress*

in sexual violence.

Documentation, Costs & Summoning Witnesses.

Since late 1998, the Board has paid for all hospital records submitted to it.[43] For medical, dental, and therapeutic reports, the Board will reimburse no more than $100.00 per record, no matter the actual cost.[44] In its latest Annual Report, the Board wrote that it spent $337,700. to pay for documentation.[45] The Board obtains any police reports it requires directly from the police.[46] From the medical community, the Board wants results of rape kit examinations, and any other exam done by a hospital, physician, psychiatrist, psychologist, dentist, physiotherapist, or chiropractor. Survivors must bear the costs of such reports up front and the Board places emphasis on psychiatrists or medical doctors' reports and has even produced a list of psychiatrists from which it prefers to hear.[47] Though the anti-violence community has pointed out to the Board that costs can prohibit poor Survivors from seeking compensation, the policy has not changed.[48] As a concession, the Board will make the necessary arrangements to obtain the required documentation, if victims cannot afford to do so.[49] We have no idea what those

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Report, undated.
[43]Criminal Injuries Compensation Board, *Bulletin*, Toronto, ON, undated.
[44]*Supra* note 16 at 3.
[45]*Supra* note 25 at Table 3.
[46]*Supra* note 16 at 3.
[47]*Supra* note 42 at 25.
[48]Letter to Chisange Puta-Chekwe, former Chair, Criminal Injuries Compensation Board, Toronto, ON, July 25, 1995 from Joan Gullen, Chair, Sexual Assault Network, Regional Coordinating Committee to End violence Against Women, Ottawa, ON.
[49]*Supra* note 29 at 9. See also "Board stated that they deal with requests for interim payment under s. 14, but have not had very many requests. Lori said she wasn't even aware this was possible under s. 14, and that that's part of the communication problem." Letter to Sharon Rosenfedt, former Chair, Criminal Injuries Compensation Board,

arrangements may be or whether Survivors know they are available. Parties who wish to have witnesses summoned to give evidence at a hearing will have to make the request for a summons to the Board and must bear whatever cost is involved in having it served.[50]

Hearing Formats.

Board hearings are available in two formats: documentary or oral. The former takes approximately three months to arrange and both the Survivor and the Alleged Offender must consent to it. The Board prefers to adjudicate as many claims as possible this way.[51] In documentary hearings, nobody but the adjudicator is present and the Survivor's story is lifted from paper. These hearings may be reviewed internally by two of the adjudicator's peers.

Oral hearings can take up to twelve months to schedule. In some of the cases discussed in Chapter IV, the hearings have taken several years though to schedule. In this type of hearing the Survivor, the Alleged Offender and whoever else the Board deems to have an interest is expected to attend but the Survivor or perpetrator may be required to attend the hearing at a remote location. "Oral hearings are conducted by a two-Member Panel unless one Member has declared a conflict of interest or has become suddenly ill."[52] In a sexual assault case involving female victims, all-female panels will

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Toronto, ON, from Darlene LeBlanc, Coordinator of Sexual Assault Network, Regional Coordinating Committee to End Violence Against Women, July 31, 1997, regarding *Notes from Meeting Between Criminal Injuries Compensation Board & the Sexual Assault Network.*

[50]*Supra* note 16 at 12.

[51]*Supra* note 38 at 2.

[52]Letter from Bryant Greenbaum, former Executive Assistant to the Chair, Criminal Injuries Compensation Board, Toronto, ON, May 29, 2003.

be assigned, if they are available and a Survivor has requested them.[53] The Survivor must know she can make the request and the Chair has to approve it. "If there are no female Board Members available and an Applicant has voiced concerns about testifying before a panel of men, then the hearing may be postponed until such time as an all female panel is available. The assignment of Members of hearing panels is the responsibility of the Chair."[54] However, the Chair must "...assign members to conduct hearings as circumstances require."[55] We will see that the Chair assigns very few female Panels to Survivor hearings, in Chapter IV.

Hearings: Private, Public, Gag Orders & *Décor*.

It is interesting to note that approximately half of all hearings held by the Board are held in private but there are supposed to be only two circumstances under which these are allowed. In the first circumstance, the Board can determine that holding a public hearing can be prejudicial to the final disposition of a criminal proceeding.[56] By putting off hearings the Board can wait for results of a prosecution that might net a conviction. With a conviction, the Board has irrefutable proof that the crime alleged has occurred.[57] The Board members' close association with the CJS suggests that it may be reluctant to criticize it and to understand the reasons why victims are sometimes seen by CJS officials as uncooperative. We will see in Chapter III why this is particularly problematic with respect to sexual assault cases especially since the enabling legislation is clear that no

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[53]Letter from Bryant Greenbaum, Former Executive Assistant to the Chair, Criminal Injuries Compensation Board, Toronto, ON, January 30, 2003.
[54]*Supra* note 52.
[55]*Compensation for Victims of Crime Act*, *supra* note 1 at s. 3.(3).
[56]*Ibid.* at s. 12 (a).

conviction is necessary for the Board to find a crime of violence has occurred.[58] Delaying hearings in order to see the results of prosecutions or intended prosecutions mean the Survivor can be made to wait years for compensation.

In the second circumstance, the Board can decide to hold a private hearing if it determines that holding it in public would not be in the interests of the Survivor.[59] This is paternalistic because adjudicators do not ask Survivors if they want privacy and so determine for her, what her interest in this regard might be. By using adjudicator discretion in a pro-victim fashion, the Board would take direction about this issue from Survivors. This would require the Board to challenge its current assumption that secret hearings benefit all rape victims. It is questionable whether holding private hearings and imposing publication bans benefit disproportionately the Board and the perpetrators, rather than the Survivors they silence. Holding public hearings for victims of sexually related crimes might not be a bad idea, if Survivors want them. However, pragmatically it would mean that the Board would need to change its policy, stop inviting Alleged Offenders, and put another policy in place to bar Alleged Offenders from Board hearings, unless the Survivors want them in attendance. The Board would then have to stop issuing private hearings and blanket publication bans every time it is faced with a claim for compensation following a sexual assault, unless requested by Survivors.

Attending a Public Hearing.

I traveled to Toronto for the purposes of researching this thesis, and wanted to

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[57] *Compensation for Victims of Crime Act, supra* note 1 at s.16.
[58] *Ibid.* at s. 11.
[59] *Compensation for Victims of Crime Act, supra* note 1 at s. 12.(b).

attend a public hearing. The Board would not commit in advance to allowing me to attend. Instead, permission to attend was withheld until moments before the scheduled hearing.[60] The former Executive Secretary to the Chair informed me that there were two reasons for this hesitation. First, the Panel has the discretion to make a public hearing a private one, at any time. Second, the Panel screens those who want to attend. Once inside, I was surprised that the hearing room's *décor* resembled a typical criminal courtroom because it precluded the expected informality. I was not the only one to notice, some Survivors were asked what they thought of the Board's hearing rooms. Survivors reported they had needed a setting in which they could feel both safe and comfortable.[61] One Survivor reported though that "The setting, the atmosphere.... the adjudicators were sitting on a bench a lot higher than me. My whole life adults have always been standing above me and hurting me. I have no power/control. I was being cut off."[62] Another said "I wasn't offered anything to drink...there wasn't any water. There was no Kleenex. I'll never forget it."[63] For another Survivor, the room was traumatic. That was because "The room I was in was a legal library. It was very traumatic in terms of remembering my court experience." [64] Another Survivor concurred. She "...didn't think it should have been in a court room setting. I think it should have been just in a room with some chairs, not too big and not too small. Something nice and

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[60]Visit to Criminal Injuries Compensation Board, Toronto, ON, May 23, 2003.
[61]*Supra* note 36 at 96.
[62]*Ibid.*
[63]*Ibid.*
[64]*Ibid.*

cosy. If you could have water jugs on the table to make it more informal."[65]

Testimony.

Working with the *Statutory Powers Procedure Act*,[66] adjudicators can hear hearsay testimony, seek opinions and conclusions from witnesses. If Board Panels do not want to hear certain testimony, they can refuse it.[67] Today Section 276 of the *Criminal Code*[68] prohibits decision-makers from utilizing evidence of a complainant's sexual history for the purpose of showing that she is more likely to have consented to sex on a particular occasion or to show she is less worthy of belief because she had sex on other occasions.[69] Unfortunately, there are no such restrictions that exist with respect to the Board's use of sexual history evidence. Although due process concerns seem less pressing in proceedings before the Board than in a criminal matter, a Survivor may be subjected to questioning regarding her sexual history before the Board under circumstances where it would not be permissible in a criminal trial.

Legal Representation.

The Board has access to a plethora of paid lawyers from the Office. Having a former Attorney General, lawyers, and judges working as adjudicators might also be of help to navigate proceedings. This is in contrast to Survivors who are not entitled to any monies from the Board for their legal expenses, unless it is to fill out the Board's

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[65] *Ibid.*

[66] R.S.O. 1990, Chapter S.22, [hereinafter *Procedure Act*]. Amended by: 1993, c. 27, Sched.; 1994, c. 27, s. 56; 1997, c. 23, s. 13; 1999, c. 12, Sched. B., s. 16; 2002, c. 17, Sched. F, Table. s. 15.(1).

[67] *Ibid.* at s. 23.(2).

[68] *Criminal Code*, R.S.C. 1985, c. C-46, s. 1.

application. Because some Survivors have little or no money to pay for lawyers, they are forced to attend Board hearings frightened and alone. For those who can afford a lawyer, the Board will refuse to communicate with a Survivor and will only correspond with her lawyer.[70] Any information a represented Survivor may desire about her file, must be obtained from her lawyer.[71] We discuss lawyer problems for Survivors, in Chapter III.

Accessing Board Orders.

When any member of the public wishes to look at decisions being made by the Board, they must travel to the Board's library in Toronto. The library itself is not very well organized and because the library doubles as a hearing room, it is regularly and unpredictably inaccessible. It is recommended that visitors obtain an appointment in advance and this can take weeks.[72] For those living in different parts of Ontario, a visit can mean great personal expense. For photocopies of public material, the Board will treat a photocopy request as Access to Information requests.[73]

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[69]*Ibid.* at s. 276.
[70]*Supra* note 16 at 8.
[71]*Ibid.*
[72]Telephone conversation between M. Louise Marchand and the former Executive Assistant to the Chair, Ontario Criminal Injuries Compensation Board, May 2, 2003. Though the writer proposed a variety of dates and on many the library was unavailable.
[73]Photocopies were denied to the writer during her Board visit on May 23, 2003. Although I had received assurance from the former Executive Secretary to the Chair, that because the contents of the library are for public scrutiny, I could make photocopies when it came time to let me photocopy, he informed me that the Board must treat my photocopy request as an Access to Information Request, though I never submitted one on this matter. Though I saw Board Orders with no publication bans that related to Survivor applications and photocopies of these were requested, the Board retroactively placed a publication ban on them. The writer notes that there is nothing in the Board's enabling legislation that allows them to impose publication bans retroactively.

Reviews & Appeals.

Board decisions are final except in two circumstances. In the first circumstance, if a Survivor had a documentary hearing and does not agree with the Board's decision, she can request a review by another panel.[74] In 1999-2000, there were thirty-six review hearings, in 2000-2001, there were eight, and in 2001-2002, there was one.[75] Those who have had oral hearings cannot ask for a review unless they received an award and requested a review because they want the Board to vary it.[76] That review can result in more or less money being awarded and an application for the review can be made by the Board, the Survivor, a dependant of the Survivor, the Minister and even the perpetrator.[77] In the second circumstance, if the Board made a mistake on a question of law, a Survivor can appeal the decision in Divisional Court. Only twenty-three appeals about any matter are reported between 1973 and 2000.[78] None of the foregoing appeals related to Survivor applications. We discuss three appeals made on Board decisions from the 80's and 90's that are gender, but not sexually related in Chapter IV.

If a Survivor wishes to appeal a Board decision, she will likely have to pay for legal representation. If she was not represented during the hearing, which is often the case, she will also need to recognize what might be a question of law before deciding to undergo the appeal process, invest money and time in it and hire a lawyer to represent her. Once the Survivor decides to launch an appeal though, she must obtain a legal

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[74]*Compensation for Victims of Crime Act, supra* note 1 at s. 10.(1).
[75]*Supra* note 27 at Table 1
[76]*Compensation for Victims of Crime Act, supra* note 1 at s. 25.(1).
[77]*Ibid.* at s. 25.(1).
[78]Quicklaw™ was consulted.

representative that will properly represent her and the lawyer will need an understanding of sexual violence issues.

Though it would have been interesting to know the reasons why there are no appeals regarding Survivor claims it was outside the ambit of this thesis to find out. As such, the writer hypothesizes five possible reasons why there are none though the Board has been adjudicating for over 30 years.

(1) Survivors are laypersons and do not easily recognize questions of law.
(2) Survivors are economically disadvantaged and cannot finance an appeal.
(3) Survivors were traumatized during their Board hearing and do not want to face another legal process that might re-victimization them.
(4) The Board can only make a limited number of errors in law because once a judge has made a ruling; it is unlikely that the Board will repeat the error.
(5) The Ontario Legislature has not substantially amended the Board's enabling legislation so adjudicators have nothing new to make mistakes about.

Stare Decisis & Burden of Proof.

The Board is not bound by *stare decisis*.[79] It follows it when it wants. In one of its recent decisions, it cited a fifty-two-year-old British Columbia divorce decision to explain its burden of proof.[80] As opposed to the principles in criminal law, the Board need not get to the truth of any allegation and adjudicators need only be convinced that an offence happened based on a balance of probabilities that it did. In addition, unlike criminal trials, during Board hearings adjudicators can find nobody guilty of a crime do not have the authority to dispossess anyone of their liberty and cannot issue fines for any criminal activity. Because the Board does not report its decisions, nothing it decides can deter individuals or society-at-large from committing similar crimes. Board decisions do

[79]*Supra* note 53.
[80]*Smith* v. *Smith,* [1952] 2 S.C.R. 312.

not affect social policy on sexual violence issues since all those decisions have publication bans imposed on them. We will see in Chapter IV that while adjudicators do write that the standard of proof they used in making their decision was the civil law's, that was not the case.

Bodily Harm, Nervous or Mental Shock & Medical Expertise.

The Board's enabling legislation allows adjudicators to award compensation for limited expenses incurred due to injury, death, pecuniary loss, pain, suffering, support for a child born from rape and other expenses the Board thinks it is reasonable to incur. It typically defines injury as actual bodily harm but it does include pregnancy and nervous or mental shock. There is no special head of damages that includes the typical emotional injuries done to rape victims unless the rape provoked a medically supported mental illness. The Board looks for evidence that the mental or nervous shock caused a psychiatric illness or psychological condition that requires treatment. Though it requires medical evidence, if the Board does not have it because the Survivor never saw a doctor, or she saw the wrong doctor, adjudicators will often deny the Survivor benefits. If mental or nervous shock was not difficult enough to prove, the Board has also stated that medical evidence alone may not be sufficient to establish the injury.[81] However, the Board does not reveal what else will lead it to make that determination and none of the Survivors who came before the Board in any of the decisions released to me ever qualified for mental or nervous shock. To get a sense of under which circumstances the Board has decided someone qualified for the injury, the writer consulted summarized

[81]Criminal Injuries Compensation Board, *Bulletin: Injury Known as Mental or Nervous*

claims. In one successful claim, the Board awarded a woman $8,000. for pain and suffering after she witnessed the murder of her partner by her convicted son.[82] The applicant suffered reactive depression and extreme emotional distress. Her symptoms included anxiety attacks; sleep difficulties, nightmares, and uncontrollable crying. She sees a psychiatrist and takes medication for depression. In another claim the applicant's son was murdered and the Board granted her $6,000. for funeral and related costs and an additional $500.00 for travel costs so that her son to attend the funeral.[83] Because the Board's decisions are often written badly, we hope the Board in making its award to the applicant's son was not referring to the deceased's costs. The Board awarded another woman, robbed at work $5,000. for her pain and suffering caused when a gun was pointed at her.[84] Her symptoms included nightmares, flashbacks, crying spells, intense fear, and intrusive memories. The symptoms described in the first and third case are often the same experienced by Survivors who do not qualify for benefits because they did not meet the criteria for nervous or mental shock.

The medical expertise required by the Board as well as by other legal processes is how we have married medicine with law. When experts are called to give an opinion, or produce a report, there is no mention that the tests used to evaluate Survivors will have much weight and credibility, depending on the area of science.[85] For one thing, having

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Shock, Toronto, ON, 2003.
[82]*Supra* note 27, Award File Number 0006-20635 at 34-5.
[83]*Ibid.* at Award File Number 9902-13525 at 35.
[84]*Ibid.* at Award File Number 9906-15313 at 37.
[85]See Kimberley White-Mair, "Experts and Ordinary Men: Locating *R.* v. *Lavallée*, Battered Woman Syndrome, and the "New" Psychiatric Expertise on Women within Canada Legal History" (2000) 12 CJWL 407 at 425-6. White-Mair discusses that "[t]he

invented the concept of mental disorder, psychiatry imposes categories on vulnerable others and these categories have been mediated through texts. We see the Board rely on the foregoing in its decisions, later in Chapter IV. Some of the mediated texts include not only mental health legislation, it also includes a hodgepodge of other authoritative texts used by a variety of decision makers such as the Diagnostic and Statistical Manual of Mental Disorders (DSM),[86] police reports, results of rape kit examinations, other specialized or general medical or therapeutic reports, the Board's own enabling legislation, the Canadian criminal statute, various jurisprudence and others. Using them can mean that their oppressive nature will inform Survivor injuries, rather than the individual who has been injured.

The Board, by requiring psychiatric expertise, forces Survivors to seek psychiatrists' services. However, when Survivors do not consult with that medical profession, they cannot qualify for the injury of nervous or mental shock because the Board relies on that expertise to make the determination of nervous or mental shock. The explicit appeal to psychiatric or medical expertise to define the injury of mental or

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historical practice of engaging expert witnesses has produced and reproduced a number of systemic biases and contradictions that persist in the trials of women today and complicate efforts to make deep changes to the law. Common sense interpretations of psychiatric theory in the courtroom by witnesses and legal officials allowed certain theories, or parts of theories, about women's behaviour to be more readily taken up as legal fact rather than as alternative narratives, including those theories of the defendants themselves" and how the routine practice of engaging psychiatric discourse, though psychiatric discourse is a social construct in itself, which has served to reaffirm rather than challenge popular opinion. The experts, she writes, often present their opinions and observations through a guise of scientific objectivity while the essence of their statements made about the sexual nature of women and the influence of domestic circumstances on a woman's ability to reason, are rooted in mythology.

[86]American Psychiatric Association, *Diagnostic and statistical manual of mental*

nervous shock casts the Board's fact-finding that result in denied claims as outwardly objective while pragmatically doing the exact opposite.[87] It might be time that the Board breaks with psychiatry and stop looking within it for trauma frameworks given the oppressive tenets that inform it. It may also be time the Board rigorously de-medicalize its work.[88]

The Standing Committee on the Administration of Justice has recommended that the Board accept proof of emotional distress not only through traditional medical services, but also from shelter workers, psychotherapists and oral or written victim

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disorders, 4th ed., (DC: Washington, 1994).

[87]See Bonnie Burstow, "Toward a Radical Understanding of Trauma and Trauma Work" (2003) 9:11 Violence Against Women 1293-1317 at 1300 and 1308 and accompanying text. Burstow writes: "The DSM is the text that mediates the application of mental illness diagnoses, creates mental disorders, change's a person's identify, re-victimizes individuals and does not allow people to name problems for themselves." She also wrote that: "[p]sychiatry alienates people from their capacity to name, invalidates people's conceptualizations, imposes a stigmatized identity on them, places them on paths not of their own choosing and imposes harmful treatments on them ... Moreover, in what is a parody of authentic witnessing, people are alienated from their own stories as the questions asked enforce distortion, as provisions make subterfuge necessary, and as stories are reworked so as to fit the relevant texts ... *Further compounding the trauma is the degree to which the various processes involved replicate the dynamics inherent in the original injury: marked power differentials, a threat to life, repeated interrogation, minute observation, and intense suspicion.* Compounding this is the oppressive nature of the texts themselves, including criminalizing constructs and provisions; the racism, classism, sexism, and ableism of each of the players; and the language barrier."[Emphasis added]. See also Linda Hogle, Linda F., (2002) 21 "Claims and Disclaimers: Whose Expertise Counts?" Medical Anthropology 275 at 276: "Medical anthropologists have long recognized that the meanings or illnesses and treatments are constituted through the interactions between and among political-economic, clinical, scientific, and lay participants. Individuals in each of these domains draw upon different sources and types of knowledge in creating their own understandings of health "problems" and techniques for solving them. Beyond local meanings, however, is the question of how societies understand and demarcate various types of "expertise," and how these understandings may result in certain decision-making jurisdictions, including the assignment of responsibility for the outcome."

impact statements and that the Board "...review the criterion for compensation for pain and suffering for secondary victims."[89] While adjudicators do hear from non-traditional service providers, in Chapter IV we will see how adjudicators dismiss them.

Sometimes the medical exam record keeping by medical personnel is problematic in that it can be inaccurate or incomplete. These reports however will not be critiqued at the Board; they are taken as the complete truth. We turn to two examples where this appears be the case. In one application, a Survivor reported she could not get out of bed due to neck injuries she suffered during a sexual assault.[90] Though she went to a hospital ten times, no doctor ordered x-rays of her neck. Rather, she was diagnosed with Reye's neck. On the Survivor's eleventh hospital visit, a doctor ordered x-rays. They revealed she had three herniated disks. In another application before the Board, a Survivor was denied compensation though her injuries were listed as a broken nose, back problems, two black eyes, an out of place hip, out of place tailbone and bruises all over her body when her husband tried to rape her.[91] X-rays of her skull and spine did not corroborate some of her listed injuries though the hospital report corroborated some.

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[88]*Ibid.* Burstow at 1301.
[89]Ontario, Legislative Assembly, Standing Committee on Administration of Justice, *Report Under Standing Order 125 on the Relationship between Victims of Crime and the Justice System in Ontario: Current Status and Improvements*, (Rosario Marchese, Chair) 3rd Session, 35th Parliament, 43 Elizabeth II at 14.
[90]Board Order #07, Criminal Injuries Compensation Board, Toronto, ON, Adjudicators Peter L. Preston & Susan Hunt, undated, unreported. Note: This Board Order number has no meaning at the Board and was assigned by author.
[91]Board Order #05, Criminal Injuries Compensation Board, Toronto, ON, Adjudicators Gemma Allen & Robert Kelly, June 9, 2003, unreported. Note: This Board Order number has no meaning at the Board and was assigned by author.

Adjudicator Appointments.

Nominees for adjudicator appointments need no prior training, knowledge, or expertise. Vacancies for adjudicators are never advertised.[92] Recommendations about potential adjudicators will come to the Board through the Office and the Ontario Legislature has delegated the task of selecting adjudicators to the Public Appointments Secretariat. The Secretariat will refer names of suitable applicants to the Board for an interview.[93] Once the Board makes a selection the Ontario Legislature will appoint an adjudicator for a three year term, renewable once through Orders-in-Council.

When looking for adjudicators the Board wrote that individuals interested in appointments must have a commitment to the public service and to high ethical standards and excellence in their personal and professional lives.[94] Desirable qualities, abilities, and skills include well-developed interpersonal skills, the ability to work effectively with other adjudicators and with Board staff, and the ability to work under pressure.[95] In addition, adjudicators should be computer literate, have superior oral and written communication skills, and be able to prepare clear, well-reasoned decisions.[96]

Adjudicators must demonstrate an aptitude for adjudication, have good listening skills, an open mind, sound judgment, tact, and be comfortable with complex or sensitive issues.[97] Those selected must also have the ability to interpret legislation and be willing

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[92]*Supra* note 52.
[93]*Ibid.*
[94]*Supra* note 53.
[95]*Ibid.*
[96]*Ibid.*
[97]*Ibid.*

and able to travel, throughout Ontario.[98] In Chapter IV, we shall discuss decisions and gauge whether adjudicators meet the desired competencies.

Appointments Critiques.

The Society of Ontario Adjudicators and Regulators (SOAR) has some common sense suggestions for administrative tribunals.[99] Suggestions include that the appointment processes be transparent, centrally coordinated and carried out consistently across the tribunal sector. Others include wide public notice about the availability of an appointment, common criteria for adjudicators and additional tailored criteria for a particular tribunal's needs. SOAR advocates that applicants complete a comprehensive application form that addresses both sets of criteria and advocate that one or more committees should advertise openings and screen candidates. They recommend committee members be representatives from the public service, the Premier's office, and the client communities whom they will serve. SOAR believes the selection process should foster appointments of high quality that recognizes the importance of both the right type of experience and specialized expertise.[100]

An Ontario Commission recommended that the Ontario government review the appointment process for Chairs and Members of all agencies and that "[a]gency Chairs and adjudicators have performance agreements... and that [t]he Public Appointments Secretariat put standards in place for the appointments process."[101] Another suggestion

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[98] *Ibid.*

[99] *Adjudicator Training Section*, online: Society of Ontario Adjudicators and Regulators Homepage http://www.soar.on.ca/soar-adju_train.htm (last modified: May 2003).

[100] *Ibid.*

[101] Ontario, "Everyday Justice: Report of the Agency Report Commission on Ontario's

was made for the Secretariat to establish a screening committee of recognized and reputable individuals to evaluate applicants for new appointments against selection criteria and that it creates pools of qualified candidates.[102] The Canadian Bar Association wrote that if reform of the appointment process was made, it would go a long way to ensure public confidence in the administrative justice system.[103]

Adjudicators: Who are they?

"The Board has been fortunate in the caliber of persons appointed as Members: people who are dedicated, who bring a wealth of experience, willingness to learn and who have a commitment to treating claimants to the Board with dignity and respect during the hearing process."[104] To find out about the dedication, wealth of experience, the commitment to treating claimants with dignity and respect at the hearing, we now look at the current complement of adjudicators to see what type of expertise and experience they bring to their role as women and men appointed to make life-impacting decisions on Survivor applications. As a note, adjudicators earn a per diem rate of $135.00 per day.[105]

Marsha Greenfield is the Chair. She was first appointed as adjudicator in 1996.[106] Her salary for 2003 was $86,850.[107] Though Greenfield has worked in shelters for abused women and therefore has some understanding of gendered violence, none of the

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Regulatory & Adjudicative Agencies" April 1998, Message from the Chair (Chair: Garry Guzzo).
[102] *Ibid.*
[103] *Ibid.*
[104] *Supra* note 27 at 1.
[105] *Supra* note 52.
[106] *Supra* note 27 at 3.

decisions we examine later in Chapter IV had the benefit of her experience or knowledge because she did not adjudicate any of the Survivor claims. William Liber is a lawyer and he is one of two Vice-Chairs. He earned $73,000.[108] in 2003 and he works full-time. He was also first appointed in 1996.[109]

Two of the present adjudicators have been police officers. One was Superintendent of his police service for over thirty years.[110] Five currently appointed adjudicators are lawyers. One current adjudicator is a former Attorney General of Ontario.[111] Another current adjudicator has been a Member of Parliament. One current adjudicator has worked for elected members of the Ontario Legislature. We have an adjudicator who is a former judge of the Supreme Court of Ontario.[112] We have a television personality adjudicator and another is an engineer. Gemma Allen has a background in critical legal studies.[113] She is the current Executive Assistant to the Chair and has been with the Board, for eight years.[114] There are currently two Members who are social workers and two others who are teachers. One current adjudicator was a sexual assault examination nurse.[115] Additionally, we have no information for four new

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[107]*Supra* note 52.
[108]*Ibid.*
[109]*Supra* note 27 at 3.
[110]*Supra* note 27 at 12. Note: Robert Michael Kelly was the Superintendent of Ottawa Police from 1963-1995.
[111]*Ibid.* note 27 at 10. Note: Marion Boyd was the first woman to be appointed Attorney General for the Province of Ontario in 1993.
[112]*Ibid.* at 11. Note: Judge Wilfred R. Dupont was appointed Justice of the Supreme Court of Otnario in 1978.
[113]*Ibid.* at 10. Note: Gemma Allen hold a B.A. (Hons) in Law from Carleton University.
[114]Letter from Gemma Allen, Executive Assistant to the Chair, Criminal Injuries Compensation Board, Toronto, ON, February 10, 2004.
[115]*Supra* note 27 at 14. Note: Jeanne Schmidt received certification as a Sexual Assault

adjudicators.[116] The Board advised me that the foregoing information would be forthcoming.[117] I was assured of the same thing in November 2003.[118] I was once again reassured, in January 2004 that my request for the biographical information was not forgotten.[119] By July 2004, the Board had forwarded me none of the promised material.

While at the Board's office, the writer had an impromptu discussion with one of the newest Board adjudicators who informed me he is a criminal defence lawyer.[120] Though an attempt was made to obtain information about his practice, the Board replied that it does not " . . . approach Members for information relating to matters outside their responsibilities with the Board."[121] This is odd, given the Board seeks adjudicators with not only a professional excellence, but a personal one and adjudicators "must have a commitment to high ethical standards..."[122]

Adjudicator Training.

The Board wrote that Members usually receive issue specific training twice a

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Nurse Examiner from the Ontario Network of Sexual Assault Care and Treatment Centres – Women's College Hospital and the *Ministry of the Attorney General.* (Emphasis mine.)

[116]*Supra* note 52 at "The following Board Members have been appointed to the Board and their background biography sheets will be provided to you in the near future; Carol Fletcher-Dagenais, Willson McTavish, William Parker and Sharon Saunders."

[117]*Ibid.*

[118]Letter from Joy Osuna, Secretary to the Chair, Criminal Injuries Compensation Board, Toronto, ON, November 17, 2003.

[119]*Supra* note 114 at "With respect to your request for...biographical information on the Board's newest adjudicators, it is my understanding that this request was dealt with in letter from the Chair's Secretary dated November 17, 20003..."

[120]*Supra* note 60. Note: conversation with William Parker.

[121]*Ibid.*

[122]*Supra* note 53.

year, during Board Meetings.[123] A variety of speakers gives the Board different components of training and they come from government and non-governmental organizations.[124] Some training is mandatory some is optional. On legal training, SOAR gives new Board Members training on how to conduct effective hearings and produce decisions.[125] For other training the Board is free to attend presentations by a variety of guest speakers given by Assistant Crown Attorneys, judges, agency/tribunal reform specialists, domestic violence advocates, the Commissioner of the Ontario Provincial Police, and an employee in the Victim Services Division from the Office.[126] Most of the above individuals are employed in the CJS and when they give presentations to adjudicators, it is called training. In addition, because these presentations are given by Office employees, it is likely they reflect the CJS perspective with all its attendant discriminatory issues. Though Board Members are supposed to be sensitive to claimants and trained on sexual violence, one Board Member said that he would reduce compensation if a woman hitchhiked at night, got in a car with a bunch of men and got

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[123] *Supra* note 52 at "...opportunities for issue specific training occur at our Board Meetings that usually take palce twice a year."

[124] *Ibid.* at "Both government and non-government employees provide the training at the Board Meetings."

[125] *Ibid.*; See Society of Ontario Adjudicators and Regulators, online: http://www.soar.on.ca/soar-adju_train.htm (last modified: 23 February 2004). Training is described as "...week-long training sessions for newly-appointed adjudicators roughly three times per year. The Adjudicator Training Course covers broad issues of administrative law and justice, including the overall structure of the administrative agency sector and the functioning of various tribunals. The Course also addresses specific issues relevant to effectively conducting hearings and producing decisions, including rules of procedure and evidence. For example, the course uses interactive role-playing exercises and conducts a simulated hearing, from preliminary motions to the decision-making caucus, followed up by a decision writing exercise. The course also addresses issues of cultural sensitivity and the ethics of adjudication.

raped.[127]

Training Critiques.

Around the same time that Ontario established the Board, there was a suggestion made that adjudicators appointed to tribunals have a combination of legal training and for those with no issue-specific expertise, that they undergo specialized training to obtain it.[128] While Ontario does fill many tribunals with Members who are experts in the subject matter they adjudicate at the Board, the opposite seems true.

For almost a decade, SAN has been asking the Board to make changes to its procedures and get adjudicators some training on sexual violence issues. In 1996, the then Board Chair wrote he put the training of Board Members at the top of his priorities.[129] Ironically, the Board claims it does not even appoint an adjudicator unless the government and the Chair are both satisfied that the individual has the qualifications and experience to decide the serious cases that come before him or her. When I asked if Board members receive training in sexual violence, the Board responded that indeed they did.[130] In Chapter IV, we will look at the results of that training through Board Orders.

Feldthusen's team wrote that for research at the Board "[c]ompensation claimants were contacted with the complete cooperation of the CICB."[131] In addition, [b]oard staff contacted those individuals selected by letter to explain the project."[132] However, "[t]he

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[126]*Supra* note 53 and 113.
[127]*Supra* note 23 at Crosbie.
[128]*Supra* note 13.
[129]*Supra* note 29 at 5.
[130]*Supra note* 114.
[131]*Supra* note 36 at 72.
[132]*Ibid.*

current management of the Board does not recall a third party researcher attending the Board..."[133] and stranger still is the fact that "[t]he Chair and Chief Administrative Officer at the Board do not have any knowledge of past requests for information by other academics who wished to study gendered violence cases at the Board."[134] This is odd given that the results of the team's research have been published in at least two law journals in the last six years.[135] It is significant that the Board does not acknowledge Feldthusen's work because his team also provided them with recommendations about having responsive, sensitive people who are knowledgeable about sexual assault to deal with victims at all stages of the process and that the Board train adjudicators if it could not appoint specialized members.[136]

Board Facts & Statistics.

In this section, we examine selected Board facts and statistics. We look at the foregoing in relation to awards, applications, hearings, costs for required applicant documentation, average monetary awards, acts deemed to be occurrences and ceilings for maximum awards. We do this to observe whether the Board's enabling legislation is providing more than a token or symbolic mechanism to help the Ontario community address Survivor injuries.

- Fact: The maximum lump sum payment any eligible applicant in Ontario can obtain from the Board is $25,000. and for periodic payments, $1,000.

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[133] *Supra* note 53.
[134] *Supra* note 52.
[135] *Supra* note 36. See N. Des Rosiers, B. Feldthusen & O. Hankivsky, "Legal Compensation For Sexual Violence: Therapeutic Consequences and Consequences for the Judicial System" (March-June 1998) 4:1-2 Psychology, Public Policy, and Law 433.
[136] *Ibid* at DesRosiers.

per month.[137]

- Fact: The maximum lump sum payment regarding any one occurrence is $150,000. and in the case of periodic payments, the total award cannot exceed $365.00.[138]

- Fact: The Board may deem more than one act to be one occurrence.[139]

- Fact: In 2001-2002, the Board received 3,802 applications for compensation.[140]

- Fact: In 2001-2002, the Board processed 158 claims for all sexually assaulted adults.[141]

- Fact: In 2001-2002, the Board held 811 Documentary Hearings, 1,432 Oral Hearings, and 1 Review Hearing.[142]

- Fact: In 2001-2002, the Board disbursed $337,700 for medical, translation, police, and other reports.[143]

- Fact: In 2001-2002, the Board paid $16.7 Million to victims.[144]

- Fact: In 2001-2002, 41.82% of all monetary awards went to victims of sex-related claims. Sexually assaulted adults received either 7.40% or 8.64% of the total money paid out by the Board.[145]

- Fact: In 1991-1992 the average award paid to anyone was $5,813. While the correct figure is unknown for the 2001-2002, the Board's Annual Report reports two different average awards, paid for the same period.

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[137] *Compensation for Victims of Crime Act, supra* note 1 at s.19.(1)(a): "The amount awarded by the Board to be paid in respect of the injury or death of one victim shall not exceed, (a) in the case of lump sum payments, $25,000; and (b) in the case of periodic payments, $1000.00 per month..."
[138] *Ibid.*
[139] *Ibid.* at ss.(4): "For the purposes of this section, the Board may deem more than one act to be one occurrence where the acts have a common relationship in time and place."
[140] *Supra* note 27 at Table 5.
[141] *Ibid.* at Table 6.
[142] *Ibid.* at Table 1.
[143] *Ibid.* at Table 3.
[144] *Ibid.*
[145] *Ibid.* at Table 6. Note: Two different figures are given on this Table.

These were reported as both $6,842[146] and $7,081.[147]

- Fact: In 1997, the then Chair of the Board stated the ceiling for awards in sexual abuse cases, including counseling and pain and suffering was $6,000. and that only one to three cases a year receive it.[148]

- Fact: The Board does not track how many Survivors are denied compensation by adjudicators due to contributory, reporting or cooperation issues.[149]

- Fact: The Board claims that it does not consider the issue of contribution in sexual assault. In the Board's Application of Request for Information it sends to the police, one of the questions on the form is "[i]n your view did the victim contribute to the crime?"[150]

Having reviewed some of the Board's facts and statistics, we now turn to national statistics.

Canadian Sexual Assault Statistics.

The standard of social justice requires that the legal doctrine underlying legislation designed to protect women and children against sexual exploitation by men actually does so. It would be a failure in social justice if the doctrine itself was actually contributing to the problem for which it was intended to be the official recourse. The empirical evaluation of the actual outcomes of cases of sexual assault suggests that the legal doctrine may, in fact, be one source of the problem.[151]

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[146] *Ibid.* at *Summary of 30 years of Awards to Victims.*
[147] *Ibid.* at Table 2.
[148] *Supra* note 40 at 5.
[149] *Supra* note 53. See also *Compensation for Victims of Crime Act*, *supra* notes 1 and 18.
[150] *Supra* note 42 at 15.
[151] Edward K. Renner, Christine Alksnis & Laura Park, *"The Standard of Social Justice as a Research Process"* (1997) 38:2 Canadian Psychology/Psychologie canadienne 91. online: National Action Plan Against Sexual Assault, Publication Section

By looking at the following facts and statistics, we see the outcome of the application of the *Criminal Code*.[152] We should keep in mind that statistics gathering agencies often do not provide gendered statistics and those that do provide them are anti-violence organizations.

- Fact: Half of all Canadian women have been victims of at least one act of physical or sexual violence since the age of sixteen.[153]
- Fact: 30% of sexually assaulted women contemplate suicide.[154]
- Fact: Women reported that they tend to be more fearful of being victims of crime than men are. 64% of women reported feeling somewhat or very worried while waiting for or using public transportation alone after dark, 29% reported being somewhat or very worried if they were home alone in the evening, 18% felt somewhat or very unsafe when walking alone in their area after dark.[155]
- Fact: Of the 27,154 sexual offences reported in Canada, in 2000, 24,049 were sexual assaults and 3,105 were other types of sexual offences, i.e., sexual touching, invitation to sexual touching, sexual exploitation, incest, sodomy and bestiality. Women made up 85% of the victims of sexual assault and made up 78% of the other types of sexual offences.[156]
- Fact: 77% of all female sexual assault victims were attacked by someone they know: 37% by a close friend or an acquaintance, 29% by a current or past partner, 11% by other family members, including parents and 19% were attacked by a stranger.[157]

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http://www.napasa.org (last modified: 18 June 2004).

[152] *Criminal Code*, *supra* note 68.

[153] "Fact Sheet: Statistics On Violence Against Women In Canada", online: Status of Women Canada http://www.swc-cfc.gc.ca/dates/dec6/facts_e.html#9 (last modified: 13 November 2003).

[154] "What is Sexual Assault?" online: National Capital Freenet http://www.ncf.carleton.ca/ip/social.services/rape.crisis/sasub/whatis.txt (date accessed: 22 January 2004).

[155] *Supra* note 153.

[156] *Ibid.*

[157] *Ibid.*

- Fact: In 2002, there were 3,745 cases in Ontario's adult criminal courts for sexual offences.[158]

- Fact: In 2002, there were 2,146 cases of criminal harassment in Ontario of which less than half resulted in the accused being found guilty.[159]

- Fact: In 2002, there were 3,745 sexual offences prosecuted in Ontario courts.[160]

The statistics offered in this section were meant to highlight the seriousness of woman abuse in Ontario and in Canada and provide a snapshot into how the Board's legislation helps address it. We now leave this Chapter to look at a variety of legal solutions available to Survivors harmed through gendered violence.

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[158] *Cases in adult criminal court*, Ontario, Statistics Canada online: http://www.statcan.ca/english/Pgdb/legal19g.htm (last modified 13 July 2004).
[159] *Ibid.*
[160] *Ibid.*

Chapter III –Legal Mechanisms: Myths, Truths & Problems

Introduction.

> ... with all their flaws, restitution programmes (inside the criminal process) and compensation schemes (outside of it) have been legislated in many jurisdictions in the last 20 years. Though often underfunded, unadvertised and underused, obviously they have merits for lawmakers. For one, they enable governments faced with rising crime rates and rising public concern over crime to say, Look what we're doing for the victims ...[v]oters are told that something will be done for them when and if they are victimized and few will find out otherwise.[161]

The above interrogates the purpose of both restitution and compensation programmes. Compensation programmes may serve to justify "...strengthened police forces, provide political advantages, facilitate social control of the population but substantially fail to provide most victims with assistance..."[162] They also may "... keep the victim from demanding a real role in the prosecution process."[163] To find out what might be the point of compensation schemes, we scrutinize all available legal mechanisms first to see how they provide relief for Survivor injuries and once that is done, we will go over one Alternative Dispute Resolution scheme that the Government of Ontario put together to address a small group of Survivors' injuries. During our review, we note the purposes, principles, procedures, and practices that each mechanism espouses and has adopted in order to decide whether any of them provide a fair means of mediating between the competing interests at stake for Survivors. This chapter is crucial to our later

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[161]Patricia Clarke, "Is There a Place for the Victim in the Prosecution Process?" (1987) 8 Canadian Criminology Forum 227. Reprinted by permission of the Canadian Criminology Forum, Toronto, ON in Introduction to Legal Studies, ed. by Carleton Dept. of Law Casebook Group, Canadian Legal Studies Series, 2nd ed, (North York: Captus Press, 1995) at 164.

[162]*Ibid.* quoting Elias.

scrutiny of issues in Chapter IV since this paper is concerned with the extent in which Board procedures and practices are appropriate for an adjudicative body whose goal is to compensate victims of crime.

Criminal Law.

This legal solution requires that an injured person report a crime in order to set the CJS wheel in motion. The purposes of this legal mechanism are many. Some of them are to protect society from criminals, deter one or more individuals from committing crimes in the future, separate offenders from society, ensure the fair administration of justice and the protection of individuals' rights. The CJS is loaded with decision-makers dedicated to the pursuit of crime and bringing those accused of crime to justice. Its working tool is the *Criminal Code*.[164] Criminal offences are seen as offences against the State, it is the State that controls the prosecution process and the State whose interests are paramount. Since the accused may be facing a loss of liberty, the criminal law is very concerned with assuring that the accused is protected from the misuse of State power, and this is reflected in such things as extensive due process rights, and the onerous burden of proof that the Crown is required to meet in order to secure a conviction. The State employs legislators, police officers, Crown Attorneys, lawyers, jurors, judges, a variety of correctional and other personnel who are authorized by the State to make decisions on its behalf about what crimes to pursue, who to criminalize, and how punish those convicted of offences. Each of these CJS officials enjoys a degree of discretionary

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[163] *Ibid.* at Clarke.
[164] *Criminal Code*, *supra* note 68.

power, and the way in which that discretion is used will have a dramatic effect on what crimes are prosecuted and on the outcomes of those prosecutions. Though the Parliament of Canada defines crimes, the provincial and territorial governments have the responsibility to administer justice in their jurisdiction. Criminal law is not a legal system, which was put in place for victims and two judges summed up the victim's place under it. Bourassa J. wrote during his sentencing decision that he is "...not here to do anything for the victim."[165] Mr. Justice Archie Campbell elucidated the problem as well: "The relentless demands of the investigation, the prosecution, the defence, and the adversarial court process are not inherently victim-friendly."[166]

Initially, police officers decide what complaints to pursue depending on their police service's agenda. Police officers decide whether to "found" a complaint, or "unfound" it. Once police have decided to "found" a complaint and lay charges, the Crown has the discretion to proceed with a prosecution, negotiate a plea, or stay or withdraw the charges. The decision will depend on the victim, the evidence and to some extent the individual Crown's attitudes toward sexual assault victims. If the Crown Attorney decides to prosecute, the victim becomes a witness for the State, and if many months or years later, the accused is found to be not guilty, the case is closed. When an accused is convicted, the victim might leave the completed criminal proceedings with a sense that justice has prevailed. However, the only tangible product that can be provided to a victim through criminal proceedings is a restitution order that is meaningless if the

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[165]*R.* v. *Lafferty,* [1992] N.W.T.J. No. 38.

[166]Martin Dionne, Commentaries "Voices of Women Not Heard: The Bernardo Investigation Review: Report of Mr. Justice Archie Campbell" (1997) 9:2 CJWL 394 at

Offender lacks the resources to pay. Moreover, a restitution order will only be available if the initial complaint leads to a conviction. In order to achieve a conviction a Survivor will have to cooperate with the demands of CJS officials. We will see in this Chapter how these demands will often result in her re-victimization. Although the purposes and interests protected by the CJS are quite different from those of the Board, we will see in Chapter IV that decisions made by those who work in the CJS deeply affect the Board's practices.

Civil Law.

This legal solution allows individuals who have suffered damages to sue a wrongdoer, in court. The purpose of civil actions is to provide compensation to victims of civil wrongs. It tries to put the person aggrieved back in the same position she or he was in before the damage occurred. In some cases, criminal actions constitute a tort and though an accused may be prosecuted under criminal law, victims may sue them in civil law. However, if they have been punished in criminal law, perpetrators cannot be made to pay punitive damages. For a victim of property crime, the damages done to her or his property may be returned to its previous undamaged state through a monetary award but damages Survivors sustain because of a sexual assault cannot be returned to their previous un-raped state and so this model does not fit well for them. In addition, the process itself may tend to re-victimize Survivors. If a Survivor does choose to sue, she bears the onus of proving her allegations on the balance of probabilities. Victims who are successful at their lawsuit may feel that through the award, justice has prevailed.

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Monetary compensation can help pay for counseling or can be useful for those Survivors whose ability to earn a living has been affected by the experience of trauma.

This system is accessible to everyone but those who use it must have money to pay for legal representation. Though women are gaining ground in the workforce, they are still making a lot less money than men and many cannot easily afford to sue.[167] Survivors who were interviewed reported that on average, it cost them $1,500. to $50,000. to pay for their civil court case.[168] The success of a Survivor's civil suit can depend on her evidence, credibility, and performance on the stand. It may also depend on the understanding of gendered violence by the judge or jury and the Survivor's own legal representative. If the Survivor initiates a lawsuit,

> [t]he discovery and trial process may be perceived by some victims as being one in which the abuse, in an abstract way, is repeated....the plaintiff will be required to come face-to-face with the perpetrator, a person they may not have seen since their childhood. Needless to say, this may be a traumatic experience for a victim of abuse."[169]

In addition, time may make it difficult to recall details, dates, locations, or even the number of times the crimes occurred.[170] In the end, a defendant may be judgement-proof, as he may not have the money to pay for any damages awarded. The most that can be expected in a civil suit is money and the process "...tends to be unsatisfactory in both process and result. It is time consuming, costly, and the end result is limited even in the

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[167]Statistics Canada CANSIM, *Average earnings by sex and work pattern*, Table 202-0102, online: Statistics Canada http://www.statcan.ca/english/Pgdb/labor01a.htm (last modified: 23 April 2004).
[168]*Supra* note 36 at 96.
[169]Ronda Bessner, *"Institutional Child Abuse in Canada"* online: Law Commission of Canada http://www.lcc.gc.ca/en/themes/mr/oca/besrep1.asp (date accessed: 23 April 2003).

most successful of situations."[171] During civil litigation, some fact finders reveal their discriminatory attitudes about women through their interpretation of the evidence, of the complainant and the event. For example, one judge believed it was the complainant's responsibility to keep her husband happy sexually and if she did not, it was her fault if he sexually assaults their daughter. "If you had put out more . . . then he wouldn't go after his daughter."[172]

Administrative Law.

This system is an offshoot of the civil law solution, conceived to speed up justice in both civil and criminal courts, both of which are often backlogged with cases that necessitates long waits for those who have suffered damages. This solution does not have any of criminal law's goals and exists in federal and provincial jurisdictions. Decision-makers are laypersons, who on behalf of the relevant government make legally binding decisions on a variety of disputes. The Ontario Government has many such tribunals, commissions and boards. The burden of proof used in this legal solution is the same as the one used under the civil solution. Adjudicators are often appointed because of their expertise in a given subject matter.

Alternative Dispute Resolution

Outside the three above legal solutions, Ontario conceived the Grandview Agreement.[173] This alternative dispute resolution process was authorized in 1992, by the

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[170]*Ibid.*
[171]*Ibid.*
[172]*Supra* note 36 at 90.
[173]Goldie M. Shea, "The Grandview Survivors Support Group and the Government of Ontario", online: Law Commission of Canada

Ontario Cabinet. It was a reconciliation effort between the Grandview Survivors Support Group (GSSG), an association made up of former students from the Grandview Training School and the Government of Ontario. This contract "...served as a model for negotiations between child survivors of abuse in other institutions and other parties responsible for the institutions. The Grandview experience has been relied on not only in Ontario but in several other provinces of Canada."[174]

The Grandview Agreement acknowledged that individual solutions in the civil law process are inadequate to deal with institutional child abuse. Therefore, the parties sought a social type of response in order to facilitate the Survivors' healing.[175] It was an agreement that was deliberately different from both civil law solutions and claims that could be made under the Board.[176] The purpose of the Grandview Agreement was to compensate Aboriginal and non-Aboriginal Survivors for abuses they endured by the authorized representatives of the Ontario government. The victims of the abuse were twelve to eighteen years old girls who had been sent to the residential school. The school housed girls who were considered either unmanageable under the repealed *Juvenile Delinquents Act*[177] or whose parents could not or would not provide them with social, emotional or educational needs. "Many were subjected to physical, sexual, and

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http://www.lcc.gc.ca/en/themes/mr/ica/shea/redress/redress_main.asp#ftn42 (last modified: 4 September 2002).

[174]*Supra* note 169 at 33-34

[175]*Ibid.* at 34.

[176]*Supra* note 36 at 73.

[177]*Juvenile Delinquents Act* first enacted by SC 1908., c. 40. After many amendments, it was consolidated as R.S.C. 1952, c. 160 and consolidated again as R.S.C. 1970, c. J-3. It was repeated by SC 1980-81-82-83, c. 110, s. 80, effective April 2, 1984.

psychological abuse while in custody."[178]

Acts of physical and sexual abuse under the Grandview Agreement were compensable heads of damage. The financial awards were up to $60,000. and claimants could win multiple awards depending on the seriousness, persistence, and prolongation of abuse. In addition, it defined mistreatment as conduct that was designed to depersonalize and demoralize the person.[179] The mistreatment included taunts, intimidation, insults, and abusive language, the withholding of emotional support, taking away parental visits, isolation threats, and cruel disciplinary measures.[180] Survivors were eligible for counseling, therapy, education, training, upgrading, career counseling, financial counseling, tattoo and scar removal, or reduction.[181]

The GSSG and the Government of Ontario established a contingency fund for dental, medical and child care needs not adequately covered by other benefits. Only primary victims were entitled to compensation.[182] The Grandview Agreement included a crisis line for former residents.[183] Family Benefits and General Welfare Assistance were exempted from financial awards and each claimant was entitled to a possible $1,000. for independent legal advice though only the rare Survivor was represented by counsel during her hearing.[184] The Ontario Government paid an average award of $37,000.[185]

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[178] *Supra* note 36 at 73.
[179] *Supra* note 169 and accompanying text.
[180] *Ibid.*
[181] *Ibid.*
[182] *Ibid.*
[183] *Ibid.*
[184] *Ibid.*
[185] *Supra* note 173.

The total government cost between 1992 and 1998 was $16.4 million.[186] The total number of claimants who participated in the Grandview Agreement by September 1998 was 329.[187]

To initiate the Grandview Agreement process, claimants had to fill out a sworn application and had to obtain independent legal advice.[188] Applications for individual or group benefits were made to a committee who was composed of a neutral chairperson, a representative from the government and one from the GSSG.[189] Applicants had to sign a release which

> ...stipulated that the claimant was precluded from commencing a legal action against the Ontario government. This included any action under federal or provincial law for negligence, contributory negligence, breach of contract, breach of trust or fiduciary responsibility. However, former residents of Grandview were not prohibited from commencing a civil action against the perpetrator of abuse, or laying a complaint that could result in a criminal charge. [190]

The committee would review the application and submitted information and decided whether the Survivor had been a ward at the institution. If so, they referred the application to an independent adjudicator for review, assessment, and validation. If all went well, the adjudicator would validate the claim.[191]

There were six adjudicators appointed to hear and validate the claims.[192] The

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[186] *Ibid.*
[187] *Ibid.*
[188] *Ibid.*
[189] *Ibid.*
[190] *Ibid.*
[191] *Ibid.*
[192] *Supra* note 36 at 73.

GSSG and the Ontario Government chose the adjudicators, together.[193] Adjudicators were women who had expertise in sexual violence. Five of the six adjudicators were law professors and one was a practicing lawyer.[194] A Native woman adjudicated claims submitted by Aboriginal women.[195] Adjudicators traveled to the communities in which the Survivors lived and would go to the homes of Survivors who were too ill to travel.[196] They also held hearings in public buildings and in hotel rooms.[197] No Alleged Offenders were parties and the public was precluded from attending proceedings.[198] The only persons involved in the proceedings were adjudicators, representatives of the Ontario government, representatives from the GSSG and the Survivor.[199]

Like the Board, the adjudicators appointed to validate claims were required to apply a civil standard of proof.[200] Once decisions were made, Survivors were provided with the adjudicator's written confidential reasons.[201] Unlike the Board, none of the Grandview decisions was subject to appeal or judicial review.[202] Evidence considered included medical and psychological reports, criminal convictions, police reports, and testimony from the claimant; however, because the adjudicators had expertise in the area of sexual assault they were able to assess such evidence critically.

The Grandview Agreement included a provision requiring the Ontario

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[193] *Ibid.*
[194] *Ibid.*
[195] *Supra* note 169.
[196] *Ibid.*
[197] *Supra* note 36 at 73.
[198] *Supra* note 169.
[199] *Ibid.*
[200] *Supra* note 173.
[201] *Supra* note 169.

Government to issue a public apology. It was read into the Ontario Legislature on November 17, 1999.[203] Survivors could have their experiences recorded in a public document once criminal proceedings were ended.[204] This is in contrast to the publication bans imposed by the Board on all sexual assault claims and adjudicator decisions. Individual apologies were also sent to each Grandview claimant who had proven her claim.[205] This alternative legal mechanism was victim-centered. The Grandview Agreement was not without adjudicative problems.[206] However, the overwhelming adjudication experience reported to Feldthusen's team was positive.[207]

We turn now to problems that have been identified with decision-makers working in the CJS.

Sexual Assault & Discriminatory Practices in the CJS.

We highlight below some of the problematic areas within the CJS when the crime is sexual assault and the victim is female. We do this because much of the difficulties for Survivors that are within it will later be replicated at the Board by way of testimony, reports, and decisions made there. The result is that adjudicators, without critiquing anything that flows to them from the CJS tend to disbelieve Survivors, when there has been no justice provided to her, in the CJS. We will discuss systemic discriminatory processes and strategies being used in the CJS and show that in the results, there is

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[202] *Ibid.*
[203] *Supra* note 173 and accompanying text.
[204] *Ibid.*
[205] *Ibid.*
[206] Conversation with Grandview Agreement adjudicator Professor Diana Majury, Law Department, Carleton University, Ottawa, ON 2001.
[207] *Supra* note 36 at 83.

ultimately no relief for Survivors for the sexual assaults some of them have endured though the reason there is no relief largely has nothing to do with the facts in a rape complaint. We begin with problem areas within policing, and then we discuss issues with Crown Attorneys, lawyers, rape kits, medical expertise, jurors, judges, and case law. We end this Chapter with warnings issued by the highest court of the land regarding eradicating some of these difficulties for rape Survivors. There is a concern that: "The whole rape trial is a process of disqualification (of women) and celebration (of phallocentrism)."[208]

Police Officers.

Though the Parliament of Canada wants to encourage women who have been sexually assaulted to report the offence to police, doing so can set in motion a process that will inflict further injury on Survivors. In 1992, Parliament introduced amendments to the *Criminal Code* provisions on sexual assault, which received royal assent in 1997.[209] In the preamble to the Act Parliament enunciated its concern about the incidence of sexual violence against women and children in Canada. Though Parliament

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[208]Carol Smart, *Rape: Law and the Disqualification of Women's Sexuality*, Feminism and the Power of Law (London: Routledge, 1989) Reprinted with permission of Routledge Ltd. A Division of International Thomson Publishing Services, Inc., T. Brettel Dawson ed., Women, Law and Social Change, Core Readings and Current Issues, 3rd ed, © 1990-1998 T. Brettel Dawson and Captus Press Inc., Canadian Legal Studies Series, (North York: Captus Press, 1998) at 195.

[209]Annual Statutes of Canada, Chapter 30, Bill C-46, *An Act to amend the Criminal Code* (production of records in sexual offence proceedings) R.S., c. C-46; R.S., cc. 2, 11, 27, 31, 47, 51, 52 (1st Supp.), cc. 1, 24, 27, 35 (2nd Supp.), cc. 10, 19, 30, 34 (3rd Supp.), cc. 1, 23, 29, 30, 31, 32, 40, 42, 50 (4th Supp.); 1989, c. 2; 1990, cc. 15, 16, 17, 44; 1991, cc. 1, 4, 28, 40, 43; 1992, cc. 1, 11, 20, 21, 22, 27, 38, 41, 47, 51; 1993, cc. 7, 25, 28, 34, 37, 40, 45, 46; 1994, cc. 12, 13, 38, 44; 1995, cc. 5, 19, 22, 27, 29, 32, 39, 42.

reformed the *Criminal Code*,[210] it simply tweaked a few areas that still provide little relief for Survivors and has not put a separate legal system in place to address what it recognized as a unique crime.[211] Because Survivors still have no gendered legal solutions, when the few of them who do report a rape occurrence come forward, they are often re-traumatized. The trauma happens when they experience the full effect of the CJS. Some of them will be "whacked" by the legal actors sworn to uphold the principles of law.[212] While lawmakers reformed the criminal law to facilitate a Survivor's coming forward and getting involved with the CJS, the CJS is slow to adopt woman-friendly processes. One of the very first problems for Survivors will be at the initial complaint stage. That is because her complaint must be filtered through police officers and they are overwhelmingly male. Police officers along with other CJS decision-makers will consider things about her that they would never consider if the crime were not sexual assault. We discuss selected problems with police officers, below.

While it is important to know that fact-finders need no corroborating evidence to convict an accused, dozens of decision-makers in the CJS involved in a Survivor's rape allegation will have had little or no proper training to handle her complaint and many will base their decisions to "found", "unfound" or prosecute on the strength of corroborating evidence. Though CJS decision-makers have an obligation to be non-sexist, they need not be pro-victim given that they represent the State's interests rather than hers. While police officers, Crowns, jurors, judges and adjudicators are all supposed to look at an

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[210]*Criminal Code*, *supra* note 68.
[211]*R.* v. *Darrach* [2000] 2 S.C.R. 443.
[212]Cristin Schmitz, *'Whack' Sex Assault Complainant at Preliminary Inquiry*, The

occurrence impartially, when deciding what to do, those employed in the CJS must consider whether pursuing an allegation of rape is in the public's interest or the interests of justice to proceed. While the Board should be only pro-victim because its mandate is to compensate victims of violent crimes, those making decisions in the CJS are not under that obligation because their interests are different. The difference in interests is one reason why the criminal law model is inappropriate for proceedings before the Board. Through the CJS, there seem countless ways in which a Survivor complaint will be discounted or dismissed and often myths about sexual assault and Survivors play a role. Whatever the CJS outcome, the reports and decisions made within it must be transmitted to the Board and adjudicators there will accept the material at face value without ever critiquing the ideology or processes that informed them. The few rape cases that are cycling within the CJS reflect a very selective process of complaint elimination and we saw in Chapter I that of all the women who have been sexually assaulted, 94% of them never contacted anyone in the CJS.[213] Of the 6% that did report, only 40% of perpetrators were charged and of the charged men, only two thirds were convicted. Less than half of those who were convicted ever received a jail term.[214] In addition, "[f]ew specifics are known about the 98% of cases which never come to trial."[215] Given the seriousness of sexual assault, those who received a prison term represent a very small proportion of

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Lawyer's Weekly, May 27, 1988 and accompanying text.

[213]Statistics Canada, Juristat Service Bulletin citing Julian Roberts, *Sexual assault in Canada: Recent Statistical Trend* (1996) 21 Queen's L.J. 395; See *supra* note 165 at 402; See Amanda Parriag & K. Edward Renner, *Do Current Criminal Justice Practices Lead to Unjust Outcomes for Adult Victims of Sexual Assault?* online: http://www.napasa.org (date accessed: 15 January 2004).

[214]*Ibid.* at Statistics Canada.

"founded" police complaints, though in 85% of the cases the Survivors could easily identify their perpetrators.[216] "The large number of cases for which no legal recourse is sought by the victim suggests a lack of confidence in the criminal justice process...[t]he women who do not go to court often do not do so because they expect to be further victimized by the very process intended to protect them."[217] We know then that sexual assaults are downgraded, under-reported, under-prosecuted and convictions for these crimes are a lot lower than they are for other types of crimes.

When a sexual assault is reported to police, the officer receiving the complaint will have to make a decision about how to investigate and ultimately whether to "found" the complaint. Sometimes reports of sexual assault are processed according to how the officer who receives the complaint views the Survivor or interprets what she reports happened. This can depend on just her looks. If the police treat her insensitively, the Survivor may later withdraw the complaint, become combative, uncommunicative, or uncooperative. How a Survivor's complaint is treated by the police can depend on whether the officer is new to policing, is a patrol officer, or has reached the rank of detective.[218] When the police assess the credibility of a complainant, they can assess it through subjective lenses and if the officer believes sexist myths about rape, her or rapists, his decision to "found" or "unfound" the complaints will reflect those beliefs. If a complaint is "founded" police may lay charges, in which case the responsibility for

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[215] *Ibid.* at Parriag.
[216] *Ibid.*
[217] *Ibid.*
[218] Lee Madigan & Nancy C. Gamble, *The second rape: society's continued betrayal of the victim* (Don Mills: Lexington Books, an Imprint of Maxwell Macmillan Canada, Inc.,

conducting a prosecution will pass to the Crown Attorney. If the complaint is "unfounded" the Crown Attorney is unlikely to ever know there was an allegation of rape. Officers often know the criteria used by prosecutors to determine whether there is a reasonable prospect of conviction and if the complaint or Survivor do not meet it, their decision will likely be to "unfound" the complaint, even if the officer believes the crime happened.

Police officers often have an image of the ideal rape complaint and complainant. The ideal case is one where all the information checks out, there are police witnesses, the victim can provide a good description, there is supporting medical evidence which includes sperm and visible injuries, the Survivor is consistent, the Survivor was forced to accompany the rapist and she was previously minding her own business. The Survivor should also be a sober, emotionally stable, upset and virginal. It is best if she did not know the offender. Perpetrators should have a prison record and a long list of current charges against them.[219] In other words, the police are most enthusiastic about pursuing relatively rare types of complaints. Police officers often have personal attitudes about rape that influence their decision to "found" or "unfound" a complaint and they sometimes screen cases based on a system that caters to the archaic myth that only certain women get raped. Below, we show some examples of how the police use myths about rape to make decisions about rape complaints.

- "If a woman claiming rape has been arrested for soliciting or is a known prostitute, her charges may have merit, but they will be unfounded."[220]

1991) at 71.
[219]*R.* v. *Seaboyer; R.* v. *Gayme,* [1991] 2 S.C.R. 577 and accompanying text.
[220]*Supra* note 218 at 73.

- "Women never ask to be raped, but there is a certain type of woman who is culpable, apathetic, and ignorant."[221]

- Some women have their "head up her ass... [s]he's unable to sever former destructive relationships, and she may have a propensity to being victimized. She likes to get attention. She needs to know that somebody cares."[222]

- "These women seem to be overtrusting. They really lack caution. Well over 60 percent are preventable assaults. They start at the bar, and then she accepts a ride home. Rape happens to women who make bad decisions in life in general."[223]

- Some women are seen as less believable for their rape if the perpetrator was not a stranger.[224]

- Some police officers want to know if there was anything the woman did to contribute to her rape and whether she had been acting naturally with the rapist in order to decide if there were honourable and noble reasons for her behaviour.[225]

- Some want to know if the woman still loved the Alleged Offender or whether she is just upset over the relationship and therefore lying about rape.[226]

- Some police officers are frustrated with rape claimants because they are women who have usually made bad decisions in life. One officer interviewed claimed that in her two years as a police officer, she had not seen one single legitimate rape complaint.[227]

- Some officers want to know whether the victim tried to physically resist being raped.[228]

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[221] *Ibid.* at 74.
[222] *Ibid.*
[223] *Ibid.* at 75.
[224] *Ibid.*
[225] *Ibid.*
[226] *Ibid.*
[227] *Ibid.* at 74-5.
[228] *Ibid.* at 75-6.

- The more intoxicated a woman, the less credible she was. As well, when alcohol or drugs were involved, the more likely she had been interested in having sex, the more responsible she was perceived to be and the more she was perceived as unreasonable by police to expect the rapist to stop.[229]

- "Officers' judgments appeared to be driven more by their perceptions of the victim's drinking behavior than their perceptions of the man's drinking behavior."[230]

- In gendered violence "[o]verall, female officers, compared to male officers, were more likely to believe the alleged victim's claim, less likely to attribute blame to the victim, and more likely to attribute blame to the perpetrator."[231]

- Some officers believe that rapists are fulfilling women's rape fantasies.[232]

- Some officers call rape accidental intercourse.[233]

- Some officers believe that rape is a business deal gone badly.[234]

- A woman over seventy, a child under ten, married and traditional homemakers are more believable than single and sexually active women.[235]

- By using profiles of rapists, like the social science creation of the "gentleman-rapist," police officers might believe that if a rape matched his profile, the rape produced no harm especially if there were no physical

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[229]See Regina A. Schuller & Anna Stewart, *Police Responses to Sexual Assault Complaints: The Role of Perpetrator/Complainant Intoxication* (2000) 24:5 Law and Human Behavior 535 at 547.
[230]*Ibid.*
[231]*Ibid.* at 548. See also G.S. Rigakos, "Constructing the Symbolic Complainant: Police Subculture and the Nonenforcement of Protection Orders for Battered Women" (1995) 10:3 Violence and Victims 227 at 234: "...the police officer is greatly influenced by a history of violence in his or her own background (Stich, 1986 as cited in Edwards, 1989 at 99-100).
[232]*Jane Doe v. Toronto (Metropolitan) Commissioners of Police*, 126 C.C.C. (3d) 12 at 27.
[233]Jane Doe, *The Story of Jane Doe: a book about rape*, © 2003 Jane Doe (Toronto: Random House of Canada Limited, 2003) at 203.
[234]*Ibid.*
[235]*Supra* note 218 at 74.

injuries.[236]

The prevalence of these beliefs among police officers has consequences for Survivors who make compensation claims before the Board. That is because the Board often relies heavily on police reports and the opinions of investigating officers in determining whether compensation should be awarded.

In addition, the Board may reduce or reject a claim outright where the Survivor failed to report the offence to police or failed to cooperate with the prosecution of the accused.[237] However, such conduct does not necessarily cast doubt on the allegation that a sexual assault occurred. Survivors often do not report an assault to police out fear of re-victimization, and the police themselves may alienate the Survivor through insensitive treatment. In one civil case, a Survivor successfully sued the Metropolitan Toronto Police Service for its negligent and discriminatory approach to the investigation of a series of rapes. The judgment in that case included a detailed examination of police occurrence reports.

- In one report, it was noted that a victim was yelled at so loudly by the desk sergeant who had taken the sexual assault investigator training, the staff sergeant on duty had to investigate what was going on. It turned out that problem was due to the Survivor having never been informed she would be required to go to court. When she found out, she avoided the service of a subpoena because she feared her attacker would return and kill

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[236] *Supra* note 232 at 44. Note: The Oliver Zink Rape Cookbook was submitted as evidence in Jane Doe's trial. The "gentleman-rapist" discussed in the Doe trial is a rapist said to cause far less harm compared to other types of rapists. He is described as a rapist who does not use violence though rape is inherently an act of violence. The gentleman-rapist uses little profanity, is unselfish, rapes gently, at times apologizes to his victim and uses only the force necessary to overcome his victim Note: The Metro Toronto Police Force still utilizes rapists' profiles as part of their sexual assault investigations.

[237] *Compensation for Victims of Crime Act, supra* note 18.

her. The subpoena had been served by plain-clothes officers who chased her down a hallway and confined her in an elevator.[238]

- On the day a Survivor was sexually assaulted, a police officer telephoned her at home but because she had been in the shower, it had taken her a long time to answer. When the officer learned she had been in the shower, he said he should have been in the shower with her.[239]

- A Survivor could neither hear nor speak, so an officer was assigned because of his ability to sign. He began by signing he did not believe her and then he refused to continue signing. He cautioned her with public mischief charge, for making a false report and accused her of having intercourse with a boyfriend.[240]

- Police did not even speak to a doctor who had provided a forensic report corroborating a Survivor's allegations. Rather, the officer cautioned the Survivor with a public mischief charge and advised her to take a polygraph though the victim was hysterical and sobbing at the time. According to the officer, the Survivor was putting on an act.[241]

- Some Survivors reported that their initial police report was wrong. Either they were so shaken that they forgot essential details or the police officer did not copy down the information correctly.[242]

Some police officers do not understand rape trauma syndrome, even after taking the sexual assault investigator course. Officers have been chosen inappropriately to take the training. Some have been chosen because they were available.[243] The results are poor when officers sent for sexual assault training are not the "cream of the crop."[244] The experience of the female trainers was like being fed to the wolves.[245] Sexual assault investigative training does not necessarily mean that a police officer is equipped to

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[238] *Supra* note 236 at 27.
[239] *Ibid.* at 30.
[240] *Ibid.* at 27.
[241] *Ibid. at* 26.
[242] *Ibid.* at 25.
[243] *Ibid.* at 26.
[244] *Ibid.* at 25.

handle sexual assault complaints with expertise or sensitivity.

Lawyers & Crown Attorneys.

Crown Attorneys are lawyers and lawyers learn legal history, specialized vocabulary, strategies, precedents, and instruments needed to do their job, no matter which side of the court they happen to be on. To test the hypothesis that Survivors are subjected to courtroom strategies that capitalize on rape myths and undermine justice through prejudicial verdicts and re-victimization of the victim, five recent empirical studies have been conducted and the results revealed that indeed myths were pervasive.[246] Nevertheless, rape myths were not seen as disparaging from the perspective of the bar.[247]

Crown Attorneys decide whom to prosecute and their power to prosecute or withhold prosecution is enormous.[248] When the prosecutor is interviewing the woman, she may be in such a state of shock, that on reflection may remember forgotten details, in a calmer manner. Pointing out her inconsistencies though and not going ahead with a prosecution for that reason, can leave the Survivor feeling re-victimized.[249] A prosecutor said if a woman waited too long to report the rape, especially a date rape, he will not prosecute.[250] Another stated that if the Survivor is an attractive teenaged girl who dressed provocatively, used drugs and has a sexually active dating history, this would be used

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[245]*Ibid.*
[246]Amanda Parriag, *An Analysis of the Courtroom Dynamics of Sexual Assault Trials* (D. Phil., Carleton University 2001) [unpublished, archived at Carleton University, Ottawa, ON] at Abstract.
[247]*Ibid.*
[248]Mark Carter, *Prosecutorial Discretion as a Compliment to Legislative Reform: The Post-C.C. Section 43 Scenario*, online: Law Commission of Canada http://www.lcc.gc.ca/en/themes/gr/rl/ldi1999.pdf (date accessed: 23 January 2004).
[249]*Supra* note 218 at 92.

against her when deciding whether or not to prosecute.[251] One barrister stated it was not important whether a woman had been raped when she had been in a permanent relationship with the accused. In fact, she felt strongly about wasting money to prosecute these complaints.

> . . . unless there is extreme violence involved or it's part of a sort of campaign of harassment. I have had to prosecute an awful lot of cases where people have still been sort of seeing each other after having a relationship, where he wants it and she doesn't and it happens. Well she says it was a rape and probably, yes, it really was. But frankly does it matter?[252]

Others reported that they sometimes refuse a case if they do not believe it is convincing because their egos and reputations are on the line and they like to win.[253]

For some criminal defence attorneys, justice for the Survivor is sometimes not on the agenda at all. For example, one lawyer stated that when defending a client, "...it's no holds barred in that anything that properly I can use to help secure my client's acquittal I will."[254] On the question about whether the sensitivity of a Survivor is taken into account, the lawyer said that "... the blunt answer is no..."[255] One female defence lawyer has a sympathy for some men who have been accused of rape.

> [t]o be honest there are lots of women who make complaints of rape who would sleep with the local donkey and the defendant says, 'Well, how can she possibly say I raped her when she goes with everybody in sight. I want that brought up'. To an extent, I suppose, they're entitled to have that done because a jury must consider that if she

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[250] *Ibid.* at 93.
[251] *Ibid.* at 94.
[252] Jennifer Temkin, *Prosecuting and Defending Rape: Perspectives From the Bar* (June 2000) 27:2 Journal of Law and Society 219 at 226.
[253] *Supra* note 218 at 95.
[254] *Supra* note 252 at 230.
[255] *Ibid.*

> sleeps with nine out of ten men why is it that she wouldn't sleep with this one.[256]

There are criminal defence strategies designed to raise a reasonable doubt about what Survivors allege. Two qualitative studies reveal that in court, defence lawyers relied on the content of rape myths when questioning Survivors, and these greatly affected the outcomes of trials.[257] The following are a few techniques used by defence lawyers, to win acquitals.

(1) "...Generally, if you destroy the complainant in a prosecution, absent massive corroborating evidence or eye witness, you destroy the head. You cut off the head of the Crown's case and the case is dead . . . My own experience is the preliminary inquiry is the ideal place in a sexual assault trial to try and win it all. You can do things . . . with a complainant at a preliminary inquiry in front of a judge, which you would never try to do for tactical, strategical reasons - sympathy of the witness, et cetera - in front of a jury. You have to go in there as a defense counsel and whack the complainant hard at the preliminary. You have to do your research; do your preparation; put together your contradictions; get all the medical evidence, get the Children's Aid Society records . . . and you've got to attack the complainant with all you've got so that he or she will say I'm not coming back in front of 12 good citizens to repeat this bullshit story that I've just told the judge.[258]

(2) "...In cases where identification is not an issue, consent becomes important. These cases are reasonably easy. The parties will have known each other - will have been together, drinking, dancing. I try to point out to the jury that even if she did change her mind, it was in the middle of the act."[259]

(3) "...I try and make the witness feel and I'm more on her side than she thinks when I'm not. I don't hector the witness because I get much more out of a witness if you can establish a common ground. If you get the witness to agree with the first five of your propositions, then there is a psychological tendency to agree to the sixth even if she doesn't want to. I try to establish a wave length with a

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[256] *Ibid.* at 234.
[257] *Supra* note 246.
[258] *Supra* note 212.
[259] Gary LaFree, quoting an American defence attorney in "*Rape and Criminal Justice: The Social Construction of Sexual Assault,*" Chapter 8 Jurors' Responses to Victims' Behavior in Rape Trials, University of Maryland online: http://www.bsos.umd.edu/ccjs/faculty/lafree (last accessed 14 July 2004).

witness."[260]

(4) One lawyer stated that having a calm retelling of the rape is best, to win acquittals. This is because juries do not believe people who can recount a major tragedy calmly. So if a lawyer can calm down a witness so that she tells the court what happened to her in a calm monotone, the jury will not believe her.[261]

(5) Lawyers exploit inconsistency to suggest fabrication: "[i]t is standard defence practice in any criminal trial to try to point up inconsistencies in a witness's evidence. All the barristers would routinely do this. In rape cases such inconsistencies are highlighted to suggest that the complainant may have lied on the issue of consent. Comparisons were routinely made between what the complainant said by way of recent complaint and what she said subsequently to others when describing what had happened to her. If she did not say the same thing to all parties this would be pointed out as an inconsistency. Of course people's accounts of events do differ depending on the person to whom they are speaking. Complainants frequently mention matters to doctors which they might not mention to police officers. But differences, albeit trivial, would be presented by the defence as inconsistencies and as indicators of unreliability and lack of truthfulness."[262]

(6) One lawyer stated that medical notes are useful as they may show a history of mental problems or that she has made up stories, in the past.[263]

The question that is to be left in the minds of fact-finders by employing the above strategies, is not whether the accused raped the victim, but whether the rape is justified, whether complainant contributed to her injuries, and whether there is evidence to corroborate her allegation. These tactics depend on universally known sexist and stereotypical gender roles and mythology surrounding rape, those who survive it and those who commit the crime. These are designed to confuse the victim so that she can mix up her dates, not recall events in a linear fashion and when that happens the defence has constructed her as an unreliable witness to her own rape and the juror or judge will

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[260] *Supra* note 252 at 230.
[261] *Ibid.* at 229.
[262] *Ibid.* at 233.

often have a reasonable doubt and thus find the accused not guilty.

Rape Kits & Medical Expertise.

The rape kit was designed to collect forensic evidence from a rape victim to be used in sexual assault investigations and prosecutions though many emergency room doctors have no training in rape trauma. To begin the examination the Survivor has to give her legal consent and often does so at a time when she is in shock and under duress. Nonetheless, if Survivors do not consent to the examination, decision-makers in the CJS may be too quick to draw a negative inference. If she has not reported the rape to the police, rape kit examiners may be required to report it to them and this may prevent some Survivors from going to the hospital if they do not want the police involved.[264] The rape kit examination is a very invasive procedure that must be done within hours of the rape, and this may deter many victims.[265] Part of the rape kit exam requires the Survivor to submit to having swabs taken from her vagina or anus and allowing photographs to be taken of her genitals for use in the courtroom. Doctors may take blood tests for evidence of drug or alcohol use, which are then used by decision-makers in the CJS against her. Rape kits will often not result in conclusive evidence about whether a sexual assault ever occurred, and cannot determine the issue of consent.[266] Though the rape kit might disclose physical evidence of a rape, which can be helpful to a prosecution, not having physical evidence does not mean rape did not occur. However, decision-makers have

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[263] *Ibid.* at 236.
[264] *Supra* note 218 at 83.
[265] *Ibid.* at 84.
[266] *Ibid.* at 89.

rejected allegations of rape based on rape kit results, on occasion.[267] If the police "founded" a Survivor's allegation of rape, the results of the kit will go to a Crown Attorney who has the discretion to decide whether to prosecute.

Jurors.

Some jurors believe some women tempt men to rape them, by wearing certain clothes.[268] Parriag, Renner, and Alksnis noted however that robbery victims are never asked about their clothing choices.[269] On alcohol and recreational drug consumption, jurors tend to hold the Survivor responsible for an assault because the consumption reflects on a woman's character, and the result for some jurors is that she is the cause of the rape.[270] Jurors are very lenient with Alleged Offenders if there is any suggestion of contributory behavior on the part of the Survivor. Contributory behaviour can include hitchhiking, dating, and talking with men at parties.[271] Jurors are less likely to believe the complainant if she was sexually active outside marriage.[272] An American juror said that he did not think a woman can be raped and wanted to know what she was doing out at

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[267] *Supra* Board Order #03; See e.g. Margaret J. McGregor et al, "Examination for sexual assault: Is the documentation of physical injury associated with the laying of charges? A retrospective cohort study" (1999) 160 CMAJ 1565 online: NOW Legal Education and Defence Fund, http://www.nowldef.org/html/njep/PDFdocs/1565.pdf (date accessed: 6 December 2003).

[268] Amanda Parriag, K. Edward Renner & Christine Alksnis, *"Is Logic Optional in the Courtroom? An Examination of Adult Sexual Assault Trials"* © Copyright 1998 K. E. Renner, online: National Action Program Against Sexual Assault http://www.napasa.org.pub14.htm (last accessed 14 July 2004).

[269] *Ibid.*; See *supra* note 218 at 94.

[270] *Supra* note 218 at 73.

[271] *Ibid.* at 75.

[272] *Supra* note 212.

night and what she did to provoke it.[273] One juror heard a judge say that women can run faster with her pants down than can a man.[274] For other jurors, a woman must be unconscious to claim rape because if she is awake she can scream and kick.[275] Though many jurors are caring, some of them view poor women or single mothers as deserving of whatever happens to them and so hesitate to convict the men accused of rape.[276] When jurors heard information regarding an alleged rape victim's prior sexual history, regardless of whether the information was confirmed, they perceived the accused as being less guilty than those cases where there was no information relating to the victim's sex life. The decrease in perceived guilt varied directly with the amount of negative information about the Survivor's past.[277] Finally, "[f]or the woman jurist who has been pressured into sex but who has not called this rape, how difficult is it for her to identify another's woman's submission as rape?"[278]

Judges & Supreme Court of Canada Warnings.

Judges may also be subject to discriminatory attitudes concerning Survivors and these attitudes may have a bearing on the way they preside over a trial, findings of law, and, in many cases, assessing the credibility of witnesses and making findings of fact. For example, a judge said that women do not always mean no when they say no to sex

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[273]*Supra* note 259.
[274]*Ibid.*
[275]*Ibid.*
[276]*Supra* note 252 at 225.
[277]*R.* v. *Seaboyer; R.* v. *Gayme,* [1991] 2 S.C.R. 577 at p. 595 quoting K. Catton, "Evidence Regarding the Prior Sexual History of an Alleged Rape Victim: Its Effect on the Perceived Guilt of the Accused" (1975) 33 U.T. Fac. L. Rev. 165 and accompanying text.
[278]*Supra* note 207 at 199.

and if they do not want sex, all they need to do is keep their legs shut.[279] Women, one judge wrote, occasionally initially resist sex but they give in through persuasion or instincts.[280]

In *R.* v. *Ewanchuk,* the Supreme Court blasted the Alberta Court of Appeal for a decision laced with discriminatory notions about women.[281] The accused in that appeal had been acquitted of sexual assault by McClung, J.A., the trial judge and the appeal court confirmed the trial judge's acquittal, though it was based on the defence of implied consent. Among other things, McClung, J.A., writing for the majority, found that there was no evidence of any sexual assault by Ewanchuk, or even its threat.[282]

> ...the complainant did not present herself to Ewanchuk or enter his trailer in a bonnet and crinolines... the sum of the evidence indicates that Ewanchuk's advances to the complainant were far less criminal than hormonal. In a less litigious age going too far in the boyfriend's car was better dealt with on site—a well-chosen expletive, a slap in the face or, if necessary, a well-directed knee. What this accused tried to initiate hardly qualifies him for the lasting stigma of a conviction for sexual assault and Alberta's current bullet-train removal to the penitentiary for prolonged shrift.[283]

McClung, J.A wrote that in the search for proof, slogans such as "No means No!", "Zero Tolerance!", and "Take back the night!" were no safe substitute for the objective application of the law.[284] At the Supreme Court of Canada, Major, J., writing for the

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[279]See Judge David Wild, Cambridge Crown Court, 1982, quoted in Elizabeth Sheehy, "Canadian Judges and the Law of Rape: Should the *Charter* Insulate Bias?" (1989), 21 Ottawa L. Rev. 741 at 741.
[280]*Ibid.* Note: Judge Frank Allen, Manitoba Provincial Court made this statement in 1984.
[281](1999) 131 C.C.C. (3d) 481 at para. 82.
[282]*Ibid.* at para. 92.
[283]*R.* v. *Ewanchuk,* 1998 ABCA 52 at para. 4 and 21.
[284]*Ibid.* at para. 12; See also Kent Roach, "The Uses and Audiences of Preambles in Legislation" (2001) 47 McGill L. J. 129 at 143 at "Some might deride "no means no" as

majority observed that according to McClung, J.A.'s analysis, a man would be free from criminal responsibility for having non-consensual sexual activity whenever he cannot control his hormonal urges.[285] The majority also observed how rape myths include the view that women fantasize about being raped, women really mean yes when they say no, that they could resist a rapist if they really wanted to and that some women deserve to be raped because of what they wear or how they behave.[286]

This Chapter discussed and gave examples of how systemic discriminatory beliefs and processes influence CJS decision-makers that either influences their decisions to "found," prosecute or convict men accused of sexually-related crimes. We discussed re-victimization issues for Survivors in the CJS if they report a sexual assault to the police. We will see in the next Chapter how these same problems arise at the Board. My introductory quotation cannot be answered yet. To answer it, we now turn to Chapter IV.

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being more of an advertising slogan than a phrase worthy of being incorporated in legislation. There is some truth to this, but in my view that does not undercut the educational value of this phrase, as men need to understand that no really does mean no. Parliamentarians used the phrase repeatedly during the legislative debates yet it appears nowhere in the preamble or the text of the law. There is no reason that the preamble could not have featured this phrase."

[285] *Supra* note 281 at para. 92.

[286] *Ibid.* at para. 82.

Chapter IV - Extending the Arm of the CJS

Appealed Board Decisions of the 80's & 90's.

There are only three reported cases of a Board decision appealed to a Superior Court discussed in this paper. That is because, as mentioned in Chapter II, there are only twenty-three appeals on record between the years 1973 and 2000. In the first two decisions below, the Board denied or reduced awards when it determined that the victims contributed to their injuries. While in recent years people have begun to reject that women ask for it when men assault them, the Board's enabling legislation requires that the Board consider victims' contribution and this requirement might encourage just this kind of thinking.[287] In the third decision, the Board reduced an award when the victim failed to cooperate with the CJS though in Chapter III we discussed some of the reasons that sexual assault victims may be reluctant to engage with CJS officials. These cases provide us with insight into the kind of conduct on the part of the victims that the Board considered blameworthy, in the 80's and 90's. We keep this in mind when we examine

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[287] *Compensation for Victims of Crime Act, supra* note 1. Compare: Letter to Bryant Greenbaum, former Executive Assistant to the Chair, Criminal Injuries Compensation Board, Toronto, ON, May 27, 2003 at: "During a hearing I attended on Friday, May 23rd, two newly appointed adjudicators – William Parker and Sharon A. Saunders sat together and heard a claim by a man who claimed to have been nearly killed and he has no idea why. The Board did not question the claimant regarding his possible contribution to his injuries, his "innocence" in the matter nor his lifestyle that may have contributed to it i.e., drug involvement. No witnesses were called. There were no police reports that shed any light on the circumstances in which the claimant obtained his injuries. I wonder what criteria the panel relion on for evidence that a crime took place in which the applicant was an "innocent" victim because in many cases this factor alone has been crucial and has resulted in the denial or reduction of awards for women victims of domestic or sexual assault injuries."; But see *supra* note 52 at "The Board cannot comment on an individual case that is currently being adjudicated." Note: During the hearing th applicant was awarded a large sum of money. In addition, the Board commented that his injuries were

what adjudicators regarded as contribution in the Board decisions that follow the three appeals discussed below.

(1) *Dalton v. Ontario (Criminal Injuries Compensation Board).*[288]

Core Issues: Contribution, Mythology, Fact Finding, and Lack of Adjudicator Expertise.

In this 1982 appeal, Patsy Dalton went to a hotel close to her home, to meet some friends. She did this every Friday evening. On this particular occasion, her husband did not accompany her. She drank alcohol with her friends and after her friends left, she continued her evening with two men who had been sitting across their table and whom were acquaintances of both her husband and herself. She danced with them until closing time and then the Alleged Offenders suggested they all go pick up some beer to share with her husband. Dalton willingly got into the back of the van with one Alleged Offender. She testified that none of them was drunk. After some time, Dalton noticed it was taking far too long to get home. She asked the Alleged Offenders where they were going and at about that time the Alleged Offender in the back of the van began making sexual advances to her. She rebuffed him and he pushed her out of the moving van. She was later found unconscious on a major and traveled Toronto highway. There was no conviction as the Alleged Offenders were never found.

Dalton's injuries were extensive. She had to have her spleen removed. She had a concussion, multiple fractures, internal injuries, and lacerations to her entire body. She was hospitalized for nearly two months and was still unable to walk normally at the time

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the worst the Board ever heard. The applicant had been beaten.

of the appeal. Despite the fact that Dalton testified that neither she nor the Alleged Offenders were drunk and that they were her acquaintances, the Board wrote that all three of them were inebriated and strangers to each other.

> In view of the fact that the applicant had consumed a fair amount of alcohol whereby her judgment was impaired and that the two unknown alleged offenders had also had a considerable amount to drink, in the Board's opinion, it was imprudent to go into a van with two unknown inebriated men and the Board concludes that the applicant was the author of her own misfortune ... [t]herefore, this application is denied.[289]

The High Court of Justice (Divisional court) could do nothing about the Board's fact-finding as the Board alone can decide how to interpret evidence as it sees fit though the appeal judge did write that other fact finders might have reached a different conclusion about the same facts.[290] In his ruling, Linden J., wrote that while a victim might be somewhat responsible for injuries, the Board had assigned all responsibility for them to the victim. The court admonished the Board for making decisions on a "whim" and wrote that by holding Dalton the sole author of her injuries, the Board had failed to consider the severity of her injuries and the contribution of the men to them and so had made an error in law.[291] The Board was ordered to rehear her claim.

This case was rooted in the mythical double standard assigned to women. Dalton transgressed her gender by attending a bar alone, drinking, and socializing with men. This decision suggests that the contribution issue might be an invitation for the Board to

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[288] *Dalton* v. *Ontario (Criminal Injuries Compensation Board)*, (1982) 36.O.R. 2d 394.
[289] *Ibid.* at accompanying text.
[290] *Ibid.*
[291] *Ibid.*

rely on discriminatory views about proper conduct for women. Women whose conduct breaches standards of propriety may be perceived as having asked for it, and contributed to their own victimization. The Board looked at Dalton's contribution through sexist lens precisely because most adjudicators appear to have no expertise to draw upon when viewing an assault on a woman by a man. Without the benefit of this expertise, adjudicators were neither able to interpret their legislation's requirement, in a gendered fashion nor see how they imported their own discriminatory beliefs about women into their decision. The appeal judge did both but we wonder how many similar decisions the Board has made for which no appeal was ever brought forward.

(2) *Re Attorney General for Ontario and Criminal Injuries Compensation Board et al. Re Jane Doe and Criminal Injuries Compensation Board.*[292]

Core Issues: Contribution, Mythology, Bad Decision Writing, and Lack of Adjudicator Expertise.

In 1995, Jane, Joan, and Jean Doe launched appeals due to the Board's decision on their claim. Each victim had been infected with HIV by a man who knew he had the virus. Charles Ssenyonga was charged and tried on the charges of criminal negligence causing bodily harm. Ssenyonga died shortly after the trial was completed, and the judge declined to render a verdict.[293]

Ssenyonga had lied to each of the victim who had each asked him about his sexual health. The Board reduced each victim's compensation by 40% because like

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[292]*Ontario (Attorney General)* v. *Ontario (Criminal Injuries Compensation Board),* (1995) O.R. (3d) 129.
[293]*Ibid.* at para. 12.

Dalton, the adjudicators perceived these Survivors had been imprudent. McMurtry C.J.O.C., O'Driscoll, and W.A. Jenkins JJ. allowed the appeal. They wrote that the Board failed to give effect to the overwhelming and horrific consequences of the victims' injuries and also failed to seek proportionality between the criminal conduct and the victims' misplaced trust.[294] They also wrote that any lack of prudence on the part of the victims paled compared to the Alleged Offender's outrageous behaviour.[295] McMurtry C.J.O.C., O'Driscoll, and W.A. Jenkins JJ. also admonished the Board for failing to give any rationale for reducing the victims' awards by 40% and ordered it to pay $25,000. to each victim.[296]

Through this appeal, we see that the Board's decision is rooted in the perception of what the adjudicators thoughts on the proper behaviour for women. Because the adjudicators lacked expertise in the area of violence against women, they punished the victims for taking risks and transgressing what they thought was their proper gender roles, just as they had done to Dalton, a decade earlier.

(3) *Simons v. Ontario (Criminal Injuries Compensation Board)*[297]

Core Issues: Contribution, Mythology, and Lack of Adjudicator Expertise

This 1982 decision flows from a decision that the Board made in which it reduced a victim's award because she did not report an assault to the police. The Board's

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[294] *Ibid.* at para. 6.
[295] *Ibid.*
[296] *Ibid.* at IX Result.
[297] *Simons* v. *Ontario (Criminal Injuries Compensation Board),* [1982] O.J. No. 1354 online: QL (OJ).

decision was appealed to the Ontario Supreme Court, High Court of Justice (Divisional Court) where Osler, J. for the majority delivered oral reasons. The ruling reveals that the Board found that on a balance of probabilities, Simons (Smirnios) was the victim of a violent crime. Though the Board's enabling legislation has changed since this decision was made, at that time the Board had made an error in law because it could not reduce an award once the Board determined a victim was eligible to receive one.[298] As such, the Board was ordered to hold a *de novo* hearing to set a more appropriate amount of compensation, if any, in light of the appeal judges' findings.

Through this appeal, we see that Board adjudicators had failed to take into consideration some of the reasons that many women do not report gendered crimes to the police. When the CJS often re-victimizes complainants in sexual assault cases, victims, may decline to report such crimes in order to avoid further trauma. If the Board had adjudicators with gendered violence expertise, adjudicators would likely not punish victims who do not contact the police because they would be able to put non-reporting in its proper context. By reducing the award, the Board was advocating and upholding a CJS goal that women should report crimes rather than focusing its attention to its mandate, which is to provide compensation to victims of violent crimes.

In all three of the above decisions, we are aware that adjudicators made up their mind about certain facts based on their discriminatory beliefs about women. We do not know just how representative these three decisions might be because we have no free access to the Board files on gendered violence issues. In addition, there are no appeals

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[298] *Ibid.* at para. 4.

reported in Quicklaw™ regarding sexual assault crimes, in the entire history of the Board, though the Board deals with many such cases. In these three appeals Board adjudicators held discriminatory beliefs about women, had no gendered violence expertise to draw upon, upheld CJS goals, did not always write their decisions in a proper manner and did not behave as a victim-centered tribunal. More then twenty-years later, we see the same problems surface again, in the decisions below.

Board Decisions Released for the First Time.

Introduction.

As mentioned earlier, for the first time in its history, the Board released a limited numbers of decisions that were subject to a publication ban, under the *Privacy Act*.[299] In view of the persistence of systemic gender-based discriminatory attitudes about sexual assault, it is important that the Board's decisions be transparent, that it be held accountable and that the public be allowed to scrutinize the Board's decisions.

All the Board Orders released to me resulted in the Board denying compensation claims to adult female claimants from April 1, 2002 to March 31, 2003. To the author's knowledge, none of the decisions examined below will be or are presently under review or appeal. In total there were forty-six decisions released though three times that number was requested, initially. On June 17, 2003, six months after the writer submitted a request to the Ontario Attorney General's Freedom of Information Coordinator to obtain Board decisions, the writer participated in a mediation teleconference where Board

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[299] *Freedom of Information and Protection of Privacy Act, supra* note 5.

representatives stated that the time required to make a decision on my Access to Information Request[300] will mean many more months of waiting. The teleconference was the result of the writer's appeal to the Privacy Commission, as the Board held firm that they would not release to me the requested decisions. In fact, during the mediation Board representatives informed me that even if I waited a very long time, the Board might never let me have access. For the sake of expediency and as a gesture of goodwill, I made the Board a proposal. My proposal was to forego two-thirds of the requested material. Five months after the proposal was made, the Board's decisions arrived.

The discrimination issues that arise in the CJS regarding sexual assault cases discussed in Chapter III arise in many of the decisions released to me. Some Board Orders were written very badly, though over two decades ago the Ontario Divisional Court wrote:

> It cannot be stated too frequently that it is desirable that a tribunal of this nature whose findings affect many individuals in unfortunate circumstances should state for the benefit of those individuals and of others who may in the future be affected, the grounds upon which it reaches its conclusion with some precision. It is desirable also that the Board indicates with precision the way in which it relates those parts of the statute on which it relies to its findings of fact. The Board's failure to do so here is regrettable.[301]

Despite what the judge had told the Board, many Board decisions contain few facts but others drone on with minutiae, emphasizing the same points repeatedly. Only in theory did adjudicators use a civil standard of proof. In addition, in no decision did an

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[300] *Supra* note 2.

[301] *Batic* v. *Ontario (Criminal Injuries Compensation Board),* [1983]1 O.A.C. 68 at para. 3.

adjudicator provide any critique of any of the material or testimony originating from the CJS. In fact in the decisions released to me, adjudicators consistently gave more weight and credibility to CJS material than other evidence and testimony before them, including medical evidence. Hearings were often adversarial and there was no victim-centered focus in the decisions released to me. The purpose of Survivor hearings seemed to more about finding ways to deny benefits, than to grant them. There was much Board reliance on mythology surrounding rape, raped women, and rapists. The types of core issues in decisions we will analyze below will not come as a surprise to many Survivors, to the few researchers who have studied the Board or to anti-violence workers who work directly with Survivors. Given that sexually related crimes motivate nearly half of the Board's monetary awards, the problems found in decisions the Board has recently made are particularly disturbing. This is made worse, when we are aware that the Board is the only administrative agency in Ontario that can ever compensate Survivors.

Three overall concerns emerge from reviewing these decisions. First, unlike criminal proceedings, the Board's purpose is primarily to provide support to victims, and its enabling legislation provides that the standard of proof claimants have to meet is based on a balance of probabilities. Nonetheless, the Board often appears to apply the criminal standard of proof, i.e., beyond a reasonable doubt. Second, although it appears that the CJS is rife with discriminatory practices and beliefs in its handling of sexual assault cases, the Board frequently accepts uncritically the evidence and documentation generated by CJS officials. Third, many of the myths and discriminatory beliefs about rape, rapists and raped women that affect the decisions of the CJS officials are replicated

by the Board. Some of these myths include that

- Women do not know what they want and some lie about being raped.
- Women want to be raped.
- Only certain classes of women are raped.
- Women ask for rape by the way they dress.
- Women cry rape to seek revenge or to hide their promiscuous behaviour.
- Women ask for rape by going to bars alone.
- Women who consume alcohol are mistaken about what really took place, i.e., consensual sex.
- Women claim rape because they were counseled into it by therapists.
- When women have said yes to sex once, they cannot be raped by the same person later.
- Rape is a part of human nature.
- Rape is an impulsive sexual act.
- Most rapes happen on the street.
- Rape always occurs spontaneously.
- A woman who goes to a man's home on their first date implies her willingness to have sex.
- Incest is rare.
- Women can resist a rapist if she really wants to.
- It is a wife's duty to satisfy her husband.
- Women raped while hitchhiking, get what they deserve.
- Only young pretty women are sexually assaulted.
- Rape does not happen very often.
- If a woman gets drunk at a party and has intercourse with a man she has just met there, she should be considered fair game to other males at the party who want to have sex with her too, whether she wants to or not.
- Unless a weapon is used, it is not rape.
- There is a right way to respond to a rape situation.
- If the victim is not a virgin then it was not rape.
- Women are safe from rape at work.
- If it is really rape then the victim will report it immediately.
- Rape is an expression of intense sexual desire.
- Raping an unwilling woman is impossible.
- Gang rape is rare.
- Most rapists only rape once.
- When a woman says no, she really means yes.
- Nice women are not raped.
- Rape is sex

All forty-six decisions were severed by the Board of identifying information including file numbers. In thirty-two decisions that related to a sexually related occurrence, hearings were conducted in private and the Board imposed a publication ban in them. For Survivors who might have wanted to broadcast or publish what happened at the Board, none of them had any "right against privacy."[302]

Board Orders continue to be numbered for the reader's ease of reference. As before, the numerical designators have no meaning whatever at the Board. Adjudicators who made the decisions have been identified. The gender mix of Panel Members is noted and the dates the decisions have been signed, are included. The analyses of these decisions will zero in on problematic core issues, and these are identified at the beginning of each decision. These issues include consent, contribution, reporting, cooperation, expertise, corroboration, mental health, injuries, credibility, mythology, evidence, burden of proof, rape kits, decision writing, identification and Alleged Offender attendance at Board hearings. Though I only have enough room in this paper to discuss nine Board Orders in depth, I also review six others and provide a description of the thirty-one other decisions released to me by the Board.

BOARD ORDER #01[303]

(One Member Male Panel)

Core Issues: Corroboration, Mental Illness, Burden of Proof, and Lack of Adjudicator Expertise.

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[302]Term coined by M. Louise Marchand, 2002, unpublished.
[303]Board Order #01, Criminal Injuries Compensation Board, Toronto, ON, Adjudicator Robert Kelly, July 23, 2002, unreported.

The Survivor notified the Board that she would not be attending the hearing. Mr. Kelly held a documentary hearing in her absence. The Board Order suggests that the Survivor may have been confined to a psychiatric hospital at the time of her hearing. The Alleged Offender was deceased and the Survivor's biological father. The Survivor alleged that he had sexually abused her when she was age ten to sixteen years. The deceased had also abused another daughter who had notified the police about incidents relating to both the Survivor as well as herself. The decision does not give any further details regarding her sibling or why she was not called to testify. The Alleged Offender died before his trial began.

Interestingly, not one CJS report was referred to in this decision, though it is incumbent on the Board to obtain them. The fact that the police "founded" the complaint and the Survivor's sister had provided some corroboration suggests that the Survivor had met the onus placed upon her to prove that on a balance of probabilities, the crimes happened. This suggests that the Board was applying a more onerous standard of proof than the civil standard mandated by legislation. The only evidence Mr. Kelly relied upon seems to be the fact that the Survivor suffered from psychiatric illness. It appears inconceivable often, to adjudicators that mentally ill women can be raped. The adjudicator regarded the Survivor's medical history as a basis to dismiss her allegations out of hand, rather then see mental illness difficulties as the expected aftermath of sexual abuse and in spite of her sister's corroborating evidence.

BOARD ORDER #02.[304]

(All Male Panel)

Core Issues: Corroboration, Burden of Proof, Expertise, Credibility, Contribution, Mythology, Rape Kit, Medical Evidence, and Lack of Adjudicator Expertise

The Survivor, a social worker working in the field of sexual abuse and a police officer described as an "experienced sexual assault investigator" were present at the hearing. There were witness statements that had been taken by the police during her investigation that were relied upon at the hearing. The Survivor claimed compensation because while she was asleep, the Alleged Offender raped her, twice.

The Survivor testified that though she had been extremely tired on the day of the rape, she decided to attend a barbecue at the home of people for whom she sometimes babysat, with one of her friends. During the evening, she consumed approximately four drinks containing alcohol. At about midnight, her friend left and asked her if she wanted a ride home. Declining the offer, the Survivor went to lie down in the living room. Before she fell asleep, the Survivor remembered having left a partial drink on the table downstairs. She got up and removed it in case the children woke up and consumed it. When she arrived downstairs, the Alleged Offender and two other men were still there, consuming alcohol. The two males were drunk and had just decided to leave so the Survivor and the Alleged Offender followed them upstairs to say goodbye. The Survivor testified that she tried to dissuade the men from driving away drunk but they left anyway. After they left, she went back downstairs to sleep on a lounging chair and while going

[304]Board Order #02, Criminal Injuries Compensation Board, Toronto, ON, Adjudicators Pierre Jacques & Bruce Goulet, July 24, 2002, unreported.

downstairs, the Alleged Offender slapped her buttocks. The Survivor protested loudly at this action, and continued down the stairs where she almost immediately went to sleep. She woke up and noticed her underwear and pants were off, so she got up and went to the washroom. She saw that she was bleeding vaginally. At that moment, she was not aware the Alleged Offender had raped her.

The next day, the Survivor started having flashbacks. She remembered the Alleged Offender penetrated her vaginally, twice, and anally once on two separate occasions. She talked to her teacher about the sexual assaults and her teacher referred her to the Sexual Assault Treatment Program. Two days after the occurrences, a rape kit examination was conducted and the examiner noted a small abrasion to her vagina and a small blister at the exterior of her anus. The examination report did not mention vaginal bleeding though the Survivor testified she bled for two months after the incidents. The Board wrote that the Survivor waited six days to report the sexual assault to the police, and did so on the advice of her sister. It took the police six more days to take her written statement and three weeks later, the police asked her to come in to do a video graphed statement.

The Survivor's family doctor sent in a report and in it, the Board noted the Survivor had suffered stress and anxiety, but the report was silent on vaginal bleeding. When the Board reviewed statements the Survivor had made during the video statement and compared to other statements made at different times to different people, the Board found her to be inconsistent. During the hearing, the Board asked the experienced sexual assault investigator if she believed the Survivor. She replied that there had been no

corroboration, there was little chance of conviction, and she did not find the Survivor credible once she had spoken to others who had attended the barbecue. The police investigator said that the two men whom the Survivor said drove away drunk told her they took a taxi home. There was nothing more than their assertion of that fact, written in the Board's decision. The two men told the police investigator that when they left the barbecue, the Alleged Offender was passed out on the couch and the Survivor was on a lounging chair. They never saw the Alleged Offender slap the Survivor on the buttocks but witnessing this would have been difficult given the Survivor testified it happened after they had left. The Board did not comment on the discrepancy. The police relied on the men's assertions, although they might have had a reason to lie about drinking and driving. However, once the men told the police they were not drunk, had not seen the Alleged Offender hit her buttocks and the police found out the Survivor had refused rides to go home, the involvement of the CJS ended.

The social worker testified that she believed the Survivor was raped. She tried to educate the adjudicators regarding some of the typical reactions rape victims have like dissociating and shock. She said people feel fear in different ways and if the fight or flight response is triggered, many respond as if they had paralysis. The Board seems to have simply dismissed this witness' testimony. Adjudicators wrote that the experienced sexual assault investigator was very convincing, had conducted a thorough investigation and had found that the Survivor very inconsistent. They also expressed concern that the Survivor had refused rides home. This was interpreted as inconsistent with the Survivor's statement that she had been tired and had earlier considered not attending the

barbecue at all. In this decision, the Board preferred the police investigator testimony and ignored the results of the rape kit that showed physical evidence of anal and vaginal disturbances. In addition, adjudicators found it significant that the Survivor did not challenge the police testimony during her hearing though she was un-represented and may not have felt comfortable cross-examining authority figures or know how to go about conducting a cross-examination. In its decision, the Board wrote that "[t] he evidence before the Board did not provide *clear and convincing proof* that on a balance of probabilities the applicant was the victim of a crime of violence and the Board denied the Applicant's claim."[305]

We note here that while the balance of probabilities is the civil law burden of proof that the crime occurred which the Board is required to use, the criminal law burden of proof requires that there is clear and convincing proof the crime occurred in order to convict an accused. In this decision, we see many problems one of which appears to be an error in law.

BOARD ORDER #03.[306]

(All Male Panel)

Core Issues: Consent, Contribution, Corroboration, Burden of Proof, Rape Kit, Medical Evidence, Mythology, "Whack" Tactic and Lack of Adjudicator Expertise.

Three years before the hearing, the Survivor alleged she was raped. A criminal

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[305]Board Order #02 at 8. (Emphasis added.)

[306]Board Order #03, Criminal Injuries Compensation Board, Toronto, ON, Adjudicators William J. Parker & The Honourable Reverend Walter Franklin McLean, March 31, 2003, unreported.

charge of sexual assault was laid by police but it was later dropped. Though we do not know the Survivor's exact age, we do know that she was under the legal age to consume alcohol, in Ontario, at the time of the incident. The Alleged Offender was an older man. He attended the hearing at a remote site and the Survivor was at the location where the Board hearing was being held. The Survivor reported symptoms of difficulty sleeping and eating, anxiety, nightmares, intrusive thoughts, and depression. A counseling report examined by the Board pointed out that her family was blaming and unsupportive. Whoever wrote the report wondered whether the Survivor's symptoms predated the rape. The Survivor had already undergone twenty-eight sessions of therapy paid for by the Board but more were needed.

The Survivor testified that the Alleged Offender raped her during a meeting pre-arranged over the Internet. The Survivor and Alleged Offender had met and later went to a bar where both had consumed alcohol. After consuming alcohol, the Survivor testified that she and the Alleged Offender went to his loft by car. Once they arrived at the loft, the Alleged Offender insisted the Survivor smoke crack cocaine and though she did not want to, she did. The decision indicates that the Alleged Offender smoked more cocaine than did the Survivor. The Board found that the Alleged Offender made physical and sexual advances to the young girl, pulled down her pants and had intercourse with her. Adjudicators noted that in the Survivor's evidence, she testified that she did not consent, but was unable to remember how she had communicated this to the Alleged Offender.

Adjudicators asked her what she thought a man would think if a girl got into his car dressed a certain way. She "conceded" that such a girl would be vulnerable to sexual

advances and depending on her clothing, a man might believe a girl would be interested in sex. The adjudicators were able to "whack" her by soliciting an *ex post factor* myth-driven statement from her, use it to exonerate the Alleged Offender from all responsibility and rely on her own mythical beliefs to deny her compensation.

The Alleged Offender insisted he be permitted to testify in order to make it clear to the Board that the Survivor had consented and he claimed to want to prevent a further injustice by awarding compensation. The Alleged Offender denied any wrongdoing and testified that the Survivor had participated in oral sex both before and after intercourse. He also said that the Applicant had made this sort of "unfounded" complaint before, as discovered by an investigator hired by his lawyers for the criminal trial. As in Board Order #01, this Survivor may have been at a disadvantage in that she did not have a legal representative skilled in cross-examination. The Board found that the Alleged Offender firmly, frankly and in a forthright manner denied any wrongdoing. What they did not mention was that some rapists can be gentlemen-rapists, as discussed in Chapter III and can charm politely their victims, into compliance. Additionally, rapists are men who are motivated to lie to legal authorities when their victims access legal solutions.

The Crown Attorney withdrew criminal charges because of serious inconsistencies between statements the Survivor made to the police, ten to twelve days following the events, her evidence at the preliminary inquiry and the results from the rape kit administered about two weeks after the occurrence. The latter did not support a successful prosecution because it did not provide evidence on the issue of consent. We noted in Chapter III that the "ideal-type" victim has to be able to give a good

demonstration in court, rape kits are not designed to go to the issue of consent and a full rape kit exam cannot be done if conducted more than seventy-two hours of a sexual assault.[307] With sexual violence expertise, adjudicators would have been able to critique the Crown Attorney's reasons to withdraw the charges, but they had none. Finally, although the Board appeared to draw negative inferences from the Survivor's conduct preceding the incident, it did not comment on the conduct of the Alleged Offender in providing drugs and alcohol to a minor, or on how such conduct might affect his credibility.[308] While the Board agreed that something happened to traumatize the Survivor, it insinuated that her trauma was due to her sister telling their father about her meeting.[309]

Adjudicators deciding this claim wrote that they were unable to find the Survivor met the onus of showing that on the balance of probabilities, she was the innocent victim of a sexual assault. We note here our earlier discussion, in Chapter III, how innocence is often constructed by decision-makers through mythological lens. The adjudicators also noted that that they had no corroboration though such is rarely available in sexual assault cases. Even in criminal trials, corroboration is no longer required to prove a charge of sexual assault. The adjudicators looked at the Survivor's contribution to a rape, though the myth about women contributed to their rape was laid to rest, long ago. The Board

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[307]*Supra* note 218 at 83

[308]*Supra* note 306. See also D. Richardson & J.L. Campbell "Alcohol and rape: The effect of alcohol on attributions of blame for rape", 8 Personality and Social Psychology Bulletin 468.

[309]The Supreme Court of Canada noted that young Survivors are frequently disbelieved, the assumption being that they lie in order to avoid the disapproval of persons in authority. *Seaboyer; R.* v. *Gayme*, [1991] 2 S.C.R. 577 at para. 52.

was concerned about inconsistencies in the Survivor's statements, although experts in the area of sexual assault believe this is a normal traumatic response for rape trauma victims. As we discussed above, adjudicators not only believed myths about Survivors, they used them in their work to extract an *ex post facto* statement from the Survivor, then used it as part of their own rationale, for denying her claim.[310]

BOARD ORDER #04.[311]

(Male and Female Panel)

Core Issues: False Memory Syndrome, Reporting, Mental Illness, Corroboration, Burden of Proof, Credibility, Injuries, and Lack of Adjudicator Expertise.

The Alleged Offender in this claim was the Survivor's father, deceased two years before her hearing. The Survivor alleged that her father sexually assaulted her on many occasions when she was ten to 12 years old. She testified that her brother raped her, several times. Adjudicators noted the Board had granted this Survivor compensation for one sexual assault by another Offender that occurred in 1993 and a physical assault by a different Offender in 1994.

The facts in this claim are sparse. We know though that the Survivor testified she started to remember the crimes alleged when she began to have nightmares ten years earlier. She initially testified that there had been no police involvement, but as the

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[310]See *R.* v. *Osolin*, [1993] 4 S.C.R. 595 at para. 179 where Cory and Major JJ. discussed how a Survivor's own feelings of guilt in the aftermath of a sexual assault are irrelevant to the question of whether a sexual assault took place. They wrote that "Feelings of guilt, shame and lowered self-esteem are often the result of the trauma of a sexual assault."

[311]Board Order #04, Criminal Injuries Compensation Board, Toronto, ON, Adjudicators Del McLennan & Joanne Kaplinski, June 12, 2003, unreported.

hearing progressed, she remembered her father was convicted of sexually molesting herself and two of her siblings. There were no CJS records referred to by the Board though it is its responsibility to seek out police reports. The Survivor testified that for years her father denied the abuse but admitted it just before his death. The Board wrote that the Survivor gave them no clear answer when she asked her why she had not submitted a claim earlier, since the current allegations predated her other hearings.

The Board had a few medical reports to rely upon. The hospital records indicated that the Survivor had symptoms of rage, anger, trust issues, sleep disruption and self-esteem difficulties and that she disclosed being raped by her brother, her father and others though her description of the circumstances surrounding them varied between hospital visits. In other words, she was not consistent from one visit to the other, perhaps adding or deleting events as her memory of the crimes became clearer. The hospital records also revealed that the Survivor entertained thoughts of suicide for many years, and because of these, had been often hospitalized.

The Board concluded that on the balance of probabilities the Survivor had not proven that she was the victim of a crime of violence by the Alleged Offender but the sexual abuse may have occurred. Here the Board suggests it had doubts about the Alleged Offender's identity, although identification of the Alleged Offender's identity is not a legal requirement to award compensation. The Board relied on the myth of False Memory Syndrome in its decision when it insinuated that the Survivor might have based her allegations on nightmares she had, rather than remembering the events, some other way. Adjudicators also pointed out that the hospital reports mentioned the Survivor's

alcohol and substance abuse difficulties, which had nothing to do with her claim. It serves though to go to support myths about women lying about rape. Although the Board had no corroborating evidence that the crime occurred from the CJS, they had plenty of corroboration that the crime occurred from hospital records. When we look at what the Panel based its decision upon, we again see a lack of sexual violence expertise at the Board. If these decision-makers had even a peripheral understanding of sexual violence issues, they could have determined that the way this Survivor had remembered the incidents were not unusual. They would have also known that the Survivor's confusion in retelling the events, the symptoms she suffered from, the reasons she was hospitalized and had drug and alcohol substance abuse difficulties and the counseling she underwent were typical manifestations and healing solutions of many rape trauma Survivors. Finally, it is very common for people suffering from rape trauma to delay in taking legal action.

BOARD ORDER #05.[312]

(Male and Female Panel)

Core Issues: Corroboration, Burden of Proof, Bad Decision Writing, Mythology, and Lack of Adjudicator Expertise.

On the morning after a house party, the police charged the Survivor's common-law husband with sexual assault, assault causing bodily harm and uttering threats. The Survivor's sister reported the incident to police. In her application to the Board, the Survivor stated she had consumed alcoholic beverages and near the end of the party had

[312]*Supra* note 91.

passed out for about an hour and a half. She listed her injuries as a broken nose, back problems, two black eyes, an out of place hip, a displaced tail bone and bruises all over her body due to her husband's criminal actions. She also had headaches, tenderness to the scalp and neck pain.

The Board had hospital records that indicated she had sustained a bruise behind her left ear. X-rays revealed no abnormalities and so the Survivor was sent home with pain medication and was advised to follow up, with her own family doctor. The Board wrote that it had no report from her doctor but it mentioned a report that indicated that because of these alleged incidents, the Survivor had participated in individual and group therapy. The Board knew that the Survivor had developed nightmares, flashbacks, and low self-esteem and trust problems. Though the police, the Survivor's sister, and a mutual friend were involved in her allegations, the Board Order does not reveal that any of them testified. In this case, the police even "founded" the Survivor's complaint, and the case proceeded to trial. Both of the foregoing are rare events in the CJS when the crime is sexual assault, as discussed in Chapter III. However, the Board makes no mention of any police report, which are its responsibility to obtain as also discussed earlier in Chapter II.

In their decision, adjudicators relied on the Reasons for Judgment in the criminal case against the Alleged Offender and it indicated to them that the Survivor and Alleged Offender were intoxicated during the party. It also discussed the Survivor's alcohol consumption and how she had been observed bumping into furniture, into people and had once fell on a coffee table. There was no comment made about the Alleged Offender's

behaviour. In the end, the judge acquitted the Alleged Offender of all charges. His reasons were that the Survivor was an unsatisfactory and unreliable witness. We discussed what type of witnesses the CJS prefers, and what it takes to win a conviction, in Chapter III.

As for the Board's reasons to deny this claim, adjudicators relied on the Survivor's inconsistencies in documentation before them and on the evidence used during the Alleged Offender's trial. The adjudicators found that her reported physical injuries were not all corroborated in the medical reports, but they were silent on those that did corroborate her injuries. Though we saw how difficult it is for Survivor to have their complaints "founded" and an accused prosecuted, the police had "founded" and the Crown Attorney had enough evidence to start a prosecution. Still, because the Board focused on what was wrong instead of what was right in this case, it determined the Survivor was not a victim of a crime of violence.

We note that the adjudicators used the same reasons to deny this Survivor justice as had the trial judge. While decision-makers working in one legal mechanism found the Survivor inconsistent, those who worked in the other said she was unreliable. There is no difference between these two findings and we note too that adjudicators did not provide any critique on any of the material they obtained. Further, there were no records obtained by the Board that is its responsibility to seek. This Survivor waited five and one half years to have justice delivered to her, and did what Parliament asked her to do. Instead of receiving justice, she was denied it no matter which legal mechanism she accessed.

In this decision, we saw that adjudicators had a total lack of expertise on sexual

violence, were unable to critique evidence, and relied on mythology surrounding the sexual availability of women who consume alcohol. It looked for corroboration that often does not exist in sexual assault cases. Rather than requiring the Survivor to prove on a balance of probabilities that her allegations were true, the Board wanted her to meet the criminal standard of proof and prove the allegation, beyond a reasonable doubt.

BOARD ORDER #06.[313]

(Male and Female Panel)

Core Issues: Corroboration, Burden of Proof, Police, Mythology, Medical Evidence, Bad Report Writing, Credibility, and Lack of Adjudicator Expertise.

We do not know the relationship between the Alleged Offender and the Survivor but we do know that the Alleged Offender abused her both as a child and as an adult. He may have been her father. The Survivor had applied for interim compensation and the Board had refused it. The Survivor was at the hearing as was three support people, including a representative of a Victim Services' Unit. Three incidents had been "founded" by the police and there was another general complaint of abuse. All allegations occurred six to seven years before the Board's hearing and the complaints that were "founded" had occurred between March and late August 1997. Though there were three separate incidents, the Board relied upon only one police report.

The police report recorded the Survivor had required no medical treatment and reported injuries as contusions on her left forearm, bruising on her right upper arm, bruising on the right side of her head and a sore back. Some of the Survivor's injuries

[313]Board Order #06, Criminal Injuries Compensation Board, Toronto, ON, Adjudicators

were corroborated through medical or hospital records, and some were not. Nevertheless, the Board found that the medical reports and the hospital records tended not to support the Survivor's written or oral statements.

Adjudicators wrote that during the hearing the Survivor testified the Alleged Offender had raped her on one occasion but there is no mention of this in their file. The Board also found it significant that at the time the allegations, the Survivor and the Alleged Offender were engaged in a custody battle. Though the Survivor reported the assault to the police, she obtained no justice from within the CJS. In other words, the results of her engagement with the CJS were the same for her as they are for those who never report a crime to legal authorities. While the police had "founded" some of her complaints and had charged the Alleged Offender, all prosecutorial attempts failed. In one, the judge had dismissed all charges after the Survivor recanted her allegations to avoid further assaults. She had received the support of Victim Services on her decision. On the second prosecutorial attempt, the Survivor had laid a private information for an assault and a sexual assault complaint before a Justice of the Peace. This resulted in "No Process." On the third prosecutorial attempt, the Crown Attorney withdrew the charge. The Board did not comment on why the prosecutor made that decision and did not write whether it had sought the reasons for it.

This Board decision reveals that the Survivor had not only cooperated with the CJS, she also went to trial as a witness. She reported some occurrences to the police and went before a Justice of the Peace to do something about other assaults. In the end, the

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William J. Parker & Susan Hunt, July 2, 2003, unreported.

Board admitted that there was no doubt of the misery she suffered through her relationship with the Alleged Offender and the effect this continues to have on her. This is one more example of how the Board appears to adjudicate with no expertise whatever about sexual violence and piggybacks on the CJS in order to make a decision on a claim before them.

BOARD ORDER #07.[314]

(Male and Female Panel)

Core Issues: Corroboration, Mental Illness, Mythology, Party Issues, Bad Report Writing, and Lack of Adjudicator Expertise.

The Alleged Offender was the Survivor's husband. The Survivor's claim was based on several of the most cruel and sadistic incidents of sexual assault with a weapon that the writer has ever read. They occurred in 1991 and 1993. The Board was aware that the Survivor had visited a psychiatric hospital. While one hospital report indicated that there was no record at all of any violence that would lead the patient to commit suicide or even need their help, another report indicated the Survivor had twice visited the hospital and had told several patients and hospital staff that she was a victim of incest, was beginning to have memories about this and these frightened her. During one particular hospital visit the Survivor told them she was not only a victim of childhood incest, but of sexual abuse as well. There was no mention of any mental illness diagnosis and the Board noted the Survivor had attempted suicide - three times, beginning at the age of seven.

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[314] *Supra* note 90.

The Board did not mention the discrepancy in hospital records rather it relied on one of them and on the testimony of a police officer described as a sexual assault investigator, with almost a decade of experience. The officer testified that he refused to "found" the Survivor's complaints, refused to lay charges and his opinion was that the allegations never occurred. In fact, this sexual assault investigator believed that the Survivor invented her complaint to help her with a child custody battle. The Board did not critique that statement nor the police officer's training as a sexual assault investigator.

We see here that the Board dismissed parts of the hospital reports that did corroborate some of the Survivor's testimony, and focused as in Board Order #05 above, on the parts that did not. The adjudicators deciding this claim relied on the police officer's myth-laden testimony and determined the Survivor had been evasive. The adjudicators wrote that she changed her testimony to serve the question and so was not credible. They too pointed out she had mental problems and alluded to the mysterious, myth-laden medically unrecognized False Memory Syndrome.

BOARD ORDER # 08.[315]

(Male and Female Panel)

Core Issues: Corroboration, Cooperation, Burden of Proof, Credibility, Mental Illness, Mythology, and Lack of Adjudicator Expertise.

The Survivor did not attend her hearing. The decision noted that she had failed to appear on other occasions and she had informed the Board that she would not participate in any oral hearing. The decision does not reveal her reasons for not wanting to take part

[315]Board Order #08, Criminal Injuries Compensation Board, Toronto, ON, Adjudicators William Liber (Vice-Chair) & Gail Scott, June 9, 2003, unreported.

of an oral hearing, though she may have specifically requested to not to have this type of hearing. The Alleged Offender was her mother's live-in partner.

The Survivor alleged that the Alleged Offender had sexually assaulted her approximately ten times. The Survivor reported these incidents to the police in 1998, five years before the hearing. The police had conducted two investigations and had interviewed the Survivor, a woman with whom she was living, the Survivor's mother, other family members, support people and individuals in the Survivor's community. Everyone interviewed told the police that the Survivor was less than credible. The Alleged Offender vehemently denied the allegations and the investigating officer laid no charges because he believed there was no reasonable chance of conviction. The decision reveals that the Survivor had refused to undergo a medical examination and had been referred for psychiatric assessment. The Board noted that the Survivor had been treated for depression by a chiropractor and had disclosed the assaults to this practitioner. The Board also refers to a psychiatric report that noted the possibility that the Survivor had suffered sexual abuse at the hands of not just one, but also several of her mother's partners. The psychiatrist noted that the Survivor's difficulties represent almost a textbook example of borderline personality disorder. Another therapeutic report noted that the Survivor suffered from depression, dissociation, nightmares, eating disorders, and obsessive-compulsive behaviour. The latter indicated that extensive therapy would help her. The Salvation Army outreach workers were contacted and they reported the Survivor had rejected suggestions made by workers for personal change.

The Board relied on hearsay opinions of those who were hostile to the Survivor's

claim, i.e., her mother. It also relied on issues surrounding her mental health and information given to it by a man described as an experienced sexual assault investigator again without questioning the source, structural problems or biases that might have been inherent in the officer's training. The Board seemed to not believe the Survivor since others did not. We have no idea if the Salvation Army's suggestions for change were appropriate for a traumatized rape victim. The adjudicators wrote that *while the Survivor might have been sexually abused, there was insufficient evidence that this was done by the Alleged Offender.* (Emphasis added.) We note in the foregoing statement that the Survivor had met the onus of proving that on the balance of probabilities, the crimes occurred and the question in their mind was not whether it happened, but by whom. This Panel was more interested in who might have done the crimes than delivering justice in the form of compensation.

BOARD ORDER #09.[316]

(Male and Female Panel)

Core Issues: False Memory Syndrome, Corroboration, Reporting, Lawyer Problems, Burden of Proof, Credibility, and Lack of Adjudicator Expertise.

A Board decision made in 1997 was ordered to be heard *de novo*. The Survivor attended as did her legal representative. By the time these adjudicators held this hearing, the Survivor's original application to the Board was probably ten years old and the allegations occurred many more decades before this hearing took place.

The Survivor claimed many ritualistic and sadistic sexual assaults were

[316]Board Order #09, Criminal Injuries Compensation Board, Toronto, ON, Adjudicators

committed against her by her father, Alleged Offender #1 and by her brother, Alleged Offender #2. While Alleged Offender #1 was deceased at the time of the Board's hearing, the Board noted that Alleged Offender #2 was twenty years older than the Survivor and she was two or three years old when he began the sexual assaults. The abuse stopped when the Survivor was about twelve years old. This Survivor started remembering the assaults when she was about thirty-three years old but was unsure if she started remembering them before or after a family funeral.

The Survivor testified that she had some memory before the funeral in the sense that she had begun to have nightmares in which Alleged Offender #1 was abusing her. After sharing her fears about being abused with her sister, the Survivor began to believe that the events were not a figment of her imagination. She talked to her niece who had years earlier tried to tell her that Alleged Offender #1 had sexually abused her. She then started remembering more of her own abuse and the Board noted that she had read several texts about childhood sexual abuse. The Survivor underwent traditional therapy and went to a Trager® practitioner.[317] Each of these therapeutic steps helped her remember. After two or three years of Trager® therapy, she started remembering the sexual assaults by Alleged Offender #2. She did not tell her mother about the abuse because she believed her mother would not have cared either way. She thinks her father

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Del McLennan & Susan Hunt, October 24, 2003, unreported.

[317]Note: Trager® Practioners utilize "...gentle, non-intrusive, natural movements, The *Trager* Approach helps release deep-seated physical and mental patterns and facilitates deep relaxation, increased physical mobility, and mental clarity. These patterns may have developed in response to accidents, illnesses, or any kind of physical or emotional

stopped when she was getting older because of his fear she would become pregnant.

The Survivor recalled that Alleged Offender #2 had sexually assaulted her when she would visit him at his home where he and his partner lived. The visits occurred about once a month and Alleged Offender #2 told her she would kill her if she told and that even if she did tell, nobody would believe her. When the Survivor was ten years old, Alleged Offender #2 had a daughter and the visits stopped. The Board remarked that there was no evidence the Survivor had ever objected to visiting her brother. The Survivor's sister provided the Board a letter in which she described how Alleged Offender #2 had tried to rape her when she was six years old. She also wrote that when she was fourteen years old Alleged Offender #1 gave her a French kiss but she had not witnessed the crimes done to the Survivor. The Survivor's niece provided the Board with a letter indicating that she had been raped by Alleged Offender #1.

The Board had two psychologist reports and one report from the Trager® practitioner. The former indicated that the Survivor had uncovered memories of several sexual, physical, and emotional abuse and the latter stated that during sessions the Survivor had recovered many memories of physical, emotional and sexual abuse by multiple perpetrators. The Board found that the Survivor honestly and sincerely believed the events happened to her but it determined that her memory might be somewhat fragile and easily restructured since in her original statement made long ago, she had not mentioned the funeral incident and the Board thought this should have been the trigger

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trauma, including the stress of everyday life." Trager ® Website, The Trager® Approach, online: http://www.trager.com/approach.html (last accessed: 10 July 2004).

that set her memory in motion.

Adjudicators did not rely on the letters from the Survivor's sister and niece, nor on any of the reports provided by the psychologist and the Trager® practitioner. The decision reveals many problems with adjudicators' understanding of childhood sexual assaults. The Board seemed to believe that as a young child, this Survivor could be expected to refuse to go to Offender #2's home, and to disclose the abuse to her mother. In Board Order #4, Del McLennan made another decision in which myth of False Memory Syndrome formed the basis of his decision and in which he denied another Survivor compensation.

BOARD ORDERS #010-015.

Though we have finished our in-depth analysis of nine Board Orders, we still have thirty-seven decisions left untouched. We now look at six more in order to give the reader a broader view of some other claims denied compensation.

In one of the six claims, the Board held a hearing for a woman who alleged she was sexually assaulted by her employer.[318] The Alleged Offender, the Survivor, her legal representative, the Survivor's friend, and a police officer attended the hearing. The police testified that there was some physical contact between the Applicant and the Alleged Offender and that the latter had been making sexual comments directed at the Applicant on the night the sexual assault is alleged to have occurred. Because some of the details of the Survivor's recollection of events were inconsistent, the Board determined her evidence was not reliable. It also found that the Alleged Offender did not

[318]Board Order #010, Criminal Injuries Compensation Board, Toronto, ON, Adjudicators

appear totally candid or truthful and wrote that its decision did not mean an assault did not happen.

In another decision, sexual assault allegations were made against a Survivor's common-law spouse.[319] The Survivor did not remember consenting to sex and testified she had not consented. The Board wrote that the couple had sex . The adjudicators found it significant that the Survivor did not confront the Alleged Offender. The Alleged Offender had been convicted of sexually assaulting the couple's 18-month-old son, but he had never been charged with crimes against the Survivor. This Survivor had been diagnosed with depression and anxiety, and suffered from mood swings, crying spells, low self-esteem, irritability, panic attacks, poor concentration, auditory hallucinations, poor eating and poor sleeping patterns. The Board wrote that it found the Survivor to be honest and forthright but that she had many opportunities to either confront the Alleged Offender regarding her allegations or report them to the police before of after her son's sexual assault. The Survivor's decision not to engage with the CJS clearly affected her chances of receiving compensation

In another decision, adjudicators heard the claim of a woman who reported being traumatized after learning that a police officer had been peeping into her home.[320] The Survivor experienced difficulty sleeping, anxiety, anger, resentment, frustration, had trouble concentrating and doing her job, was more vigilant about her privacy and safety

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Del McLennan & Gail Scott, November 27, 2002, unreported.
[319]Board Order #011, Criminal Injuries Compensation Board, Toronto, ON, Adjudicators Ronaq Massey & Joanne Kaplinski, December 9, 2002, unreported.
[320]Board Order #012, Criminal Injuries Compensation Board, Toronto, ON, Adjudicators Joanne Kaplinski & Bruce Goulet, August 27, 2002, unreported.

and she reported feeling that her personal security has been diminished because of the Offender's position within it. She moved to a different building that had security features out of concern that the Offender might retaliate, as there had been much media coverage about the incident. Other police officers knew about the Offender's behaviour but had done nothing to stop it. The officer was convicted and sentenced. However, the adjudicators determined that the Survivor did not incur an injury defined in their enabling legislation and there was no evidence to support mental or nervous shock. In fact, the Board wrote that the level of violence this Survivor experienced, was minimal. Adjudicators trivialized the Survivor's experience and arbitrarily denied her application.

In another case, a woman alleged being raped several times, while incarcerated. The Alleged Offender was a prison guard. The Survivor testified that the assaults occurred every week for two or three months.[321] The guard was able to gain access to her by manipulating the agenda that dictated where she had to work. She felt compelled to submit to his sexual advances as he was in a position to make her life difficult. Because she submitted, she was given the good, easy jobs, special treats, and food. The police officer involved in this complaint testified that during his investigation, the Survivor stated she had been involved in consensual sexual activities with the guard. The officer terminated his investigation and laid no charges. The Survivor might have had good reason to make these statements, or the officer might have interpreted her submission to sexual activities as her consent, even though the guard was in a position of authority over

[321]Board Order #013, Criminal Injuries Compensation Board, Toronto, ON, Adjudicators Susan Hunt & Robert Kelly, April 29, 2003, unreported.

her and might have been found guilty of unprofessional misconduct. The Survivor suffered mistrust in herself and in authority figures. A psychiatrist report indicated that she was suffering a major depressive disorder with psychotic features, severe recurrent panic disorder with agoraphobia, chronic dysthymia, polysubstance abuse now in apparent remission, borderline histrionic and antisocial personality disorders. In the end, the Board decided the Survivor was not credible and rejected her claim.

In the next Board decision, a Survivor alleged that she was sexually assaulted by her mother's live-in boyfriend. At the time of the incidents, the Alleged Offender also lived with the Survivor's younger siblings. Though the Survivor did not live with them, she had been sleeping at her mother's house when the Alleged Offender entered her bedroom and offered her $10.00 to remove her clothes.[322] The Survivor testified that the Alleged Offender had often made comments about her breasts and had often patted her on the buttocks. The Survivor did not report the latter occurrence to the police, until the police were already investigating other sexual assaults alleged by not only herself, by also by her siblings. There were no charges laid against the Alleged Offender regarding the Survivor's allegations, but there were charges laid in connection with the allegations made by her siblings. Though the Survivor told adjudicators she experienced nightmares and trust issues, her claim was denied because the Board did not believe the occurrences were criminal acts.

In the last decision under close review, the Survivor did not appear at her hearing. It took the Board seven years to schedule it. The Board invited the Alleged Offender's

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[322]Board Order #014, Criminal Injuries Compensation Board, Toronto, ON, Adjudicators

counsel to make submissions as to whether the hearing should be adjourned or proceed pursuant to the *Procedure Act*.[323] Counsel submitted that the documentation on file lacked the strength to meet the Board's burden of proof and a delay would not be fair to his client. The Board agreed to dismiss the application without the benefit of hearing from the Survivor though her absence may have been motivated by a fear for her safety or a discomfort with the Alleged Offender's attendance.

Other Board Orders Received

There were thirty-one other Board decisions released to me. Three decisions involved claims submitted by mothers whose children had been the victims of one or more sexual assaults. In one decision, a Survivor filed a claim because she witnessed her mother's rape. One claim involved eighteen years of sexual, physical and spiritual abuse. The Board denied two claims regarding criminal harassment crimes though in one of them the Offender was convicted. In another Board decision, adjudicators awarded a Survivor $6,000. for pain and suffering resulting from a teacher sexually assaulting her when she was ten years old. The Board then decided not to grant her the award because she had also received damages through a successful civil action. Another decision reveals that a Survivor was abused "in the name of God". Nine applicants were denied benefits when they sought compensation for the murder of a loved one. In three other murder

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Bruce Goulet & Gail Scott, July 24, 2002, unreported.

[323]Board Order #015, Criminal Injuries Compensation Board, Toronto, ON, Adjudicators Gemma Allen & Pierre Jacques, December 31, 2002, unreported;
See also *Statutory Powers Procedure Act, supra* note 66 at ss.7.(1) and 22. "Where notice of an oral hearing has been given to a party to a proceeding in accordance with this Act and the party does not attend at the hearing, the tribunal may proceed in the absence of the party and the party is not entitled to any further notice in the proceeding."

motivated applications the Board denied benefits to applicants because the deceased was involved or thought to have been involved recently, or in the past, with criminal activities that may have contributed to the death. In one application the claimant had been assaulted by her own child. She was denied compensation because the child was too young to be charged with a criminal offence. In another decision, a pregnant woman was assaulted in the abdomen. In one application the claimant had been stalked. In another, the victim alleged injuries due to harassing telephone calls. There were three decisions denying compensation for damages caused by robbery. In another application, the applicant's step-son had been beaten to death. Finally, there were two other applications due to assault with a weapon and assault causing bodily harm.

The cases we have now examined include all of the decisions released to the writer, and they suggest that despite Board's *raison-d' être* is to compensate victims of violent crimes, it does not take a victim-centred approach when making decisions on sexual assault claims nor claims that involve gendered violence. The Board seems to be using adversarial criminal justice proceedings to some extent, as its model of fact-finding and adjudication. Combined with the Board's usage of mythology, its practice reveals its total co-optation by the CJS, at least for the cases under study.

In the next Chapter we will look at how privacy is viewed by some Survivors, and what they are doing about bringing what many still consider to be private matters into the public sphere. We will look too at what some Survivors who sought justice in Ontario had to say about the Board, and other legal or quasi-legal processes. The author's conclusion and a suggestion for reforming the Board will be discussed in Chapter V.

Chapter V - Survivors, Conclusion & 10-Part Suggestion for Reform

VOICES.

VOICES is an Australian group composed of Survivors who bring rapes into the public sphere by shouting and raging about them.[324] VOICES reject imposed silence and are responding publicly to discourses about sexual assault instead of allowing the professionals and paraprofessionals doing the speaking on their behalf. They are the stakeholders and recipients of decisions made within various legal processes. Though VOICES acknowledges that not all Survivors might wish to take their anger into the public sphere, its group members do. They take their rapes into the public because they are fed up with being silenced throughout the legal system. As such, they are breaking new ground through their demands to be heard. While Australians are empowering themselves by talking openly about their rapes, all Ontario Survivors who submit claims to the Board remain legally mute.

Feldthusen Study[325]

Feldthusen's 2-year study examined a group of Survivors and their experiences seeking compensation through the Board, through civil actions and through the Grandview Agreement. Here we discuss what Feldthusen concluded regarding what Survivors wanted and what Survivors got.

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[324]E-mail to author from Albury Wodonga Women's Centre, Albury, NSW, May 15, 2003.

[325]*Supra* note 36. Feldthusen's article chronicles the results of a study in which researchers interviewed 87 Survivors. Ninety-eight per cent of the subjects were female. Forty-eight had made claims to the Board, 13 had launched civil actions, and 26 of the Survivors in the study were compensated under the Grandiew agreement.

What Survivors Wanted.

Feldthusen reported that a traumatic event usually triggered Survivors' decision to engage in legal procedures. This could be a nervous breakdown, the birth of a daughter, getting back memories or a suicide attempt. Average awards for those who used civil law solutions ranged from $42,500. to $479,000. while under the Grandview Agreement the Survivors interviewed reported receiving awards of $60,000.[326] Survivors who went before the Board though, on average, reported receiving awards in the $5,000-$10,000. range.[327] Survivors who seek justice are often motivated by fear, a desire to stop or prevent further injury to themselves, their siblings, their children or to other women.[328] Some wanted to heal and regain control over their lives, others sought public affirmation that they had been wronged, some sought justice, apologies, closure, and revenge.[329] While some family members and friends had been supportive of Survivors, others had pressured Survivors not to report being raped, at all.[330] Survivors who had either made claims at the Board, under the Grandview Agreement, or who had sued for damages in civil court were difficult to find because of publication bans. Survivors that were located were found through third parties or a media appeal. Some Survivors could not be located because lawyers who represented them in other legal processes refused to send them letters researchers had written in order to find out if they would be willing to be

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[326] *Ibid.* at 96-97.
[327] *Ibid.* at 79.
[328] *Ibid.* at 69. See also *Supra* note 218 at 91.
[329] *Ibid.* at 69.
[330] *Ibid.* at 95.

interviewed about their experiences with legal processes.[331] Some Survivors said they pursued justice in order to pay for therapy but for others, money did not motivate them at all.[332] Rather than a desire for money, many Survivors expressed a need for voice and wanted their hurt acknowledged, their experience validated, an apology and to be affirmed by someone with the legal authority to do so.

What Survivors Got.

According to Feldthusen, many Survivors were disappointed in the length of time the process took because the passage of time was associated with a sense of loss of control and this had replicated their helplessness during the sexual assault. Forty-four per cent of Survivors interviewed who went before the Board reported that they were dissatisfied with their adjudicative process. [333] They "felt as if the board was more concerned about the rights of the perpetrator than about the rights of the victim: [W]hy do they have so many rights?"[334] Another reported she "...didn't feel it was a process in which they genuinely felt concern for me."[335] Some felt the adjudicators had ridiculed their evidence, had lacked empathy and as a result some had felt abused, for the third time.[336] One Survivor stated that the Board impeded so much on her healing and

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[331] *Ibid.* at 75.
[332] Marlene Orton, *New dean takes over Canada's high-tech law school*, online: University of Ottawa http://www.uottawa.ca/services/markcom/gazette/000218/000218-art09-e.html (last modified: 5 February 2003).
[333] *Supra* note 36 at 87.
[334] *Ibid* at 88.
[335] *Ibid.*
[336] *Supra* note 333.

therapeutic process, that she needed therapy.[337] Fifty-one per cent of Survivors who filed claims at the Board were also dissatisfied with the Board's staff. They said the staff lacked respect, sensitivity and empathy.[338] Most Survivors felt the amounts awarded were insufficient and others likened the awards to contaminated, silence or blood money. One Grandview Survivor was an addict and committed suicide with her compensation money.[339]

One Survivor felt degraded by accepting the Board award.[340] Survivors reported feeling angry, outraged, heartbroken and devastated at the outcomes of their hearings and some felt they never had have a chance to tell their story.[341] Many Survivors reported that their adjudicative experience was horrible and would hesitate to recommend the process to others.[342] One of the reasons for the dissatisfaction was because the perpetrator could attend their hearing.[343] Seventy-one percent of the Survivors interviewed who had filed claims at the Board and who had an oral hearing reported that on average, their hearing had lasted one hour and forty-five minutes.[344] Fifty-three percent of Board Survivors were dissatisfied with their oral hearing.[345] Some believed the Board did not have sufficient information on which to base its decision.[346]

In contrast to how Survivors at the Board viewed their adjudicative process,

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[337] *Supra* note 330.
[338] *Supra* note 36 at 86.
[339] *Ibid* at 111.
[340] *Ibid.* at 102 and 109.
[341] *Ibid.* at 108.
[342] *Ibid.* at 102-3.
[343] *Ibid.* at 81 and 103.
[344] *Ibid.* at 84.
[345] *Ibid.*

eighty-five percent of Grandview claimants reported approval for theirs.[347] The difference in satisfaction can be attributed to a few fundamental differences. Under Grandview, claimants had their claims adjudicated by only female adjudicators who had expertise in gendered violence.[348] As mentioned in Chapter III, no Alleged Offenders were made parties and typical sexual assault injuries did not have to meet the criteria for the injury of mental of nervous shock. For those Survivors who discussed their lawsuits, seventy-three per cent were satisfied with their trial judge.[349] Only twenty-seven percent of civil litigants would recommend the process to others, though one Survivor stated it is not "...for the weak at heart."[350] Others did not think the benefits of undergoing the process outweighed the emotional costs.[351] Many Survivors were not happy with the Board. Those who did express a high satisfaction rate for their adjudicative experiences were those who filed claims under the Grandview Agreement.

Conclusion

This paper has reviewed, discussed and analyzed many issues central to Survivors who choose to access either no legal solutions at all or who choose and can access the criminal, civil, administrative or alternative dispute resolution mechanisms available to them to pursue justice for injuries done to them through sexual violence. We have now completed our examination of relevant portions of the Board's enabling legislation, the Board's mandate, selected procedures, policies and statistics. We also took a look at the

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[346] *Ibid.* at 85.
[347] *Ibid.* at 83 and 89.
[348] *Ibid.* at 73.
[349] *Ibid.* at 89.
[350] *Ibid.* at 103.

national statistical trend regarding what is currently known on the epidemic of violence against women. Unfortunately, this paper provided neither an analysis nor a review of successful Survivor applications. The difficulties in accessing decisions necessarily limited the scope of the decisions that could be studied. Rather than looking at the global situation of Survivor applications at the Board, the writer chose to focus on applications which resulted in the Board's decisions to deny, reduce or dismiss applications. To that end we did a quick overview of some Board matters and had detailed discussions on some others. We reviewed the relationship between the Attorney General and each of the Office's areas of responsibility. We examined the overall administrative appointment process in Ontario, critiques made about it and the criteria the Chair utilizes to select new adjudicators. We noted the general background of those adjudicators for which we had information, explained why we could not access information on four adjudicators and examined adjudicator training needs and the scant training they are offered. We held a discussion of the critiques and recommendations made to the Board revolving around the overall gap in expertise surrounding gendered sexual violence. We discussed the long waiting times involved when making Access to Information Requests because of publication bans. We also know that the problematic publication bans and the Board's initial refusal to cooperate with my research weighed heavily in my inability to scrutinize more than the year's worth of denied decisions which were finally released to a researcher for the first time. We also know that without the privacy legislation in place to allow access to Board decisions, and without the Board's eventual cooperation, this paper

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[351] *Ibid.*

could not have been written.

In Chapter IV, we analyzed three Board decisions from the 80's, 90's which had been appealed in court and then we analyzed some recent Board decisions where adjudicators decided to deny or dismiss claims. These decisions suggest that the Board has been co-opted by the CJS in the following ways. The Board relied uncritically on material and testimony transferred from the CJS. In several cases the Board employed a criminal standard of proof despite the fact that adjudicators wrote they had used the civil standard. The Board declined to award benefits if Survivors had not proven their allegations "conclusively", even when adjudicators believed the crime may have occurred. We saw problems with many adjudicators' interpretation of facts and we saw some of them dismiss testimony from outside agency representatives who had sexual violence expertise irrespective of whether the Panel was composed of men and women, of only men or of only women adjudicators. We know that in spite of the fact that the Board received an admonishment many years ago because they did not consider the contribution of a perpetrators' actions in relation to injuries sustained by victims, for not writing clear decisions and also that in spite of the fact that the Supreme Court of Canada has issued warnings to CJS decision-makers about the effect of myths on the decision-making by CJS officials dealing with rape complaints, the Board is still adjudicating claims as though none of these concerns have ever been raised. Adjudicators are still very concerned about women's credibility and behaviour today as they were in the 80's and 90's. So did it matter to adjudicators if a Survivor alleged being raped if coincidentally she was involved in a child custody battle and it mattered when, how and

what parts of a rape allegation a Survivor remembered in detail, what or who triggered her memory and whether she accessed any or the right kind of therapy.

In all the denied Board Orders that spanned the Board's work for one fiscal year, we saw no sympathetic or well-written Board decisions by adjudicators who the Board assured me each have the desired skill-set and subject expertise. We saw two adjudicators "whack" a Survivor during her hearing and use her *ex post factor* myth-driven statement to explain why they exonerated the Alleged Offender from the rape she alleged. Adjudicators relied on bits of testimony that did not support a Survivor's claim and ignored the parts that did. Survivors' characters were attacked and at times, Alleged Offenders were determined to be honest and forthright, arbitrarily. The Board used hearsay and hostile testimony to base their conclusions on Survivors' characters and reliability. We saw them rely on so-called police sexual assault expert investigators without ever questioning the source of their training even when such officers "unfounded" complaints because there was a child custody battle at the time of the allegations. The Board denied benefits to Survivors if there was any doubt as to the perpetrator's identity and I saw them decide that for some Survivors, unwanted sexually related acts were not criminal at all and if they were, did not really cause them much harm. The kind of core issues that were problematic in my qualitative sample study are not isolated. The feminist legal community, the anti-violence community and Feldthusen's team have all been discussing most of the same core issues identified in this paper with the Board, for about a decade. Though there have been concerns and recommendations made to the Board by the legal, feminist and anti-violence

communities to alleviate re-victimization issues, the Board has remained reticent to change and appears to routinely and uncritically embrace all of the decisions, material, strategies, processes and testimony available to them from the problematic CJS holding steadfastly on their wide discretion to do just that. They rely on the medical community in the same way, even though both are often filled with systemic and discriminatory tenets that result in subjective, sexist and arbitrary findings that are transferred to the Board through its reliance on them in order to find Survivors have not proven beyond a doubt, that they were victims of a violent crime. Feldthusen's study too provides evidence that my study case is not isolated because his team of researchers found that many Survivors were not satisfied with their adjudicative process, because of the Board's lack of expertise or sensitivity, because of the adversarial nature of hearings, because of the hearing room *décor*, because of the limited time allotted, because of the Alleged Offender's presence and because of the amounts of awards. One Survivor reported to Feldthusen's team that she needed therapy to deal with how the Board re-victimized her and many thought making claims to the Board was worse than making no claim at all. The issues which Survivors, the anti-violence, the legal and feminist communities have found or suspected to be present at the Board, have been substantiated through this paper's case study. More research is required to know whether these issues hold true in the Board's other decisions but we have enough evidence to suggest that there are serious problems for Survivors, at the Board.

Though we might believe we are progressive in Ontario, we are behind what is going on in Australia where we know Survivors use their voice to bring the public crime

of rape out of the private sphere. Here in Ontario, many of us have no idea how much rape is going on and there are good reasons for this. Other than the unusual type of rape case that is made public through the media, ordinary rape cases by significant others or men we date are largely under wrap in this country. Publication bans serve to keep this many rape cases a secret while at the same time forces many rape victims to become complicit in the secret and the scapegoats assigned to carry the shame of what was done to them. This silence is often said to be for raped victims' own good and for some of them, it might very well be good and might even be necessary. For others though, the silence might be too much to bear. When paternalistic and arbitrary publication bans combined with private hearings are imposed on victims who have had no choice in the matter, this results in feminist goals being turned on its head. Privacy when not chosen by the one who it silences, can be unhealthy and dis-empowering. While judges and government representatives usually do not impose blanket publication bans on other types of victims of violent crimes, many have the discretion to impose them without the victim requesting them if the crime is sexual. At the Board, the power to silence Survivors is applied in each and every Survivor application without consultation and without exception. To help Board decisions remain sealed from the public eye, the Board is not even required to report their decisions. Decisions made that are summarized by the Board are still severed of all personally identifying information no matter what crime prompted the application. As a result, the Board's summarized reports, usage of bans and private hearings means the Board is perpetually shielded against the kind of empirical studies ongoing in the CJS where decisions made there are reported and often debated in

public. By reporting decisions the public is at least informed of what is going on in courtrooms and it ensures that decision-makers are held accountable to those they serve. There is nobody to hold the Board accountable for its decisions made on Survivor claims or to debate the merits of them. Additionally, the public has very little idea of what exactly the Board does or whether it exists at all.

Though the Parliament of Canada recognized in 1992[352] that sexual assaults are unique crimes, it has not put a separate legal mechanism in place to address its unique nature. Neither has the Government of Ontario. Rather, both of our federal and provincial governments continue to force Survivors to choose between legal mechanisms that the legal and scholarly communities have been pointing out has serious flaws which results in a Survivor's re-victimization. From the case study in this paper, we now add one more legal solution that does not appear to work very well for many Survivors though it remains the only administrative legal solution available to victims of violent crimes, in Ontario.

I have advanced that the Board fails Survivors in many ways and one of them is due to a complete lack of sexual violence expertise by all adjudicators currently appointed by the Government of Ontario at the Board. Being co-opted by the CJS might not be so bad if the Board adjudicated applications for non-sexual crimes. However, in view of the empirical evidence of discriminatory practices in the CJS with respect to sexual assault cases, a critical approach to decisions made by CJS officials is essential if the Board is to avoid having these practices transmitted into its own procedures. Because

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[352] *Supra* note 209.

it is the only non-criminal and non-civil option available to Survivors that is of potentially limited cost, it is important the Board be able to adjudicate rape compensation applications in a non-re-victimizing fashion. Unfortunately for Survivors, a former head of the Board did not seem to know her agency's role all that well. She said that the Board was an arm of the CJS and she knew there were systemic barriers at the Board. She stated "[s]ince the *Criminal Injuries Compensation Board is part of the criminal justice system it is not surprising that certain disadvantaged groups should find systemic barrier in dealing with the Board.*"[353] This is a disturbing statement given that the head of the Board should know this tribunal is part not part of the CJS and after recognizing there were systemic barriers present should have developed policies to eliminate them. Even if at worst the Board was supposed to be part of the CJS, which it is not, the Board could have followed the CJS's progress when it begun to eradicate its sexist practices from its processes. Regrettably, the Board has done very little to follow in the positive footsteps that the CJS has taken even though they claim to be part of it. Despite the fact that the Board may find the *status quo* works for them, it is time that the Board works for all victims of violent crime and to do that the author now proposes a 10-Part reform suggestion designed with Survivors in mind. The suggestion takes into account what many Survivors have identified they need, they want and they do not want when they make claims at the Board.

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[353] *Supra* note 29 at 8. (Emphasis added)

10-Part Suggestion for Legislative and Board Reform

1. That the Ontario Legislature amends the *Compensation Act*[354] and incorporates gender considerations.

2. That the Ontario Legislature make the Board an independent body, relieving the Attorney-General of Ontario from all responsibility for it and authorize the Chair to appoint a special group of adjudicators who have gendered sexual violence expertise to adjudicate Survivor claims.

3. That the Ontario Legislature allows the Board's sexual assault adjudicator experts to make final decisions on Survivor claims, only subject to review internally by other similar gendered sexual violence expert adjudicators.

4. That the Ontario Legislature strikes a Committee composed of experts in gendered sexual violence, representatives of the anti-violence community and stakeholders who, together with critical legal and law reform specialists will make additional recommendations on legislative and Board reform to be discussed openly in the Ontario Legislature.

5. That the Ontario Legislature creates two new heads of damages to allow for the compensation of emotional injuries for Survivors and to allow compensation to third parties who have been injured through the sexual assault of another. This would include wage replacement schemes for parents who must leave their jobs because of their own injuries and the extra care required to care for the primary victim.

6. That the Ontario Legislature give the Board authority to develop and implement separate Survivor-friendly policies, procedures, and hearings.

7. That the Ontario Legislature prohibit men alleged to have raped a Survivor any involvement in Board proceedings and that the men be prohibited from utilizing legal solutions to sue Board members, Survivors or others in connection with Board proceedings.

8. That the Ontario Legislature requires the Board to take its direction from Survivors or their authorized representatives on matters pertaining to publication prohibitions and private hearings and that Board decisions be reported publicly.

9. That the Ontario Legislature requires the Committee to consider the Grandview

[354] *Compensation for Victims of Crime Act, supra* note 1.

Agreement, in its work.

10. That the Ontario Legislature relieves any adjudicator from their duties who have direct or indirect personal or professional ties with organizations devoted in part or in whole to upholding myths about rape, rapists, and raped women.

As we considered this paper we remember Robson who wrote "[w] e cannot define the path along with every tribunal which has to determine complex social questions must walk...we can keep them from turning in certain directions which are known to lead away from the promised land of justice."[355] The only way to determine whether a tribunal has turned in a certain direction, is through the scrutiny of its decisions. We have now done that, in a limited fashion. Publication bans disallowed a substantial sample to be scrutinized. We have enough information to know however that there are serious problems for Survivors at the Board. Whatever happens with Survivor claims in the future will depend on the Ontario Legislature's commitment to deliver Survivors to the promised land of justice through reform initiatives that can clear them a path in order to get them there.

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[355] *Supra* note 13.

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Appendix A

Oral Presentation Delivered September 13, 2004, 2:00 PM by M.Louise Marchand to Defence Committee, Carleton University, Ottawa, ON.

I am thrilled to be here and thank each of you for being part of this Committee.

My thesis represents the culmination of research I have conducted in the last three years. It contains disturbing information that was difficult to obtain and that has never before been made available to any member of the public. As my research deepened, it became clear to me that the discriminatory practices that still taint the prosecution of many sexual assaults in the Criminal Justice System, also arise when complainants seek other legal avenues of redress. Criminal justice officials, when prosecuting a sexual assault complaint, make use of the complainant as a witness in order to secure a conviction and in return, offers her little support and often re-victimizes her. Because of this, Survivors have often come to regret accessing any legal solutions and I discuss the ways re-victimization occurs, in my paper. For one thing, it begins at the front of the Criminal Justice System gate with a Survivor's initial contact with the police. Though we know that 85% of all victims of rape are female, in 1997 - 94% of them had never contacted the police. The 6% who did report saw only a very small fraction of perpetrators being sent to prison.

My paper points out that though the Parliament of Canada is responsible for making criminal law, wants Survivors to come forward, wants the problem of sexual

violence eliminated and has identified sexual assault as a unique crime, it has put nothing in place to provide a mechanism to address its unique nature. Neither has Ontario. I discuss in Chapter III a mechanism that did work rather well at providing a handful of Survivors justice, through an alternative dispute resolution mechanism where only experts in sexual violence made decisions and which was a legal solution put together because the usual ones were recognized to not work very well for female victims of sexual assault. I argue how decisions made in the Criminal Justice System impact many decisions made at the Board and how the Criminal Justice System has co-opted the Board to the point where the Board believes its role is that of an arm of it - rather than an independent victim-centered tribunal. I expose problems with how Board adjudicators select facts, how they interpret them and how their practices are discriminatory to women. Like the Criminal Justice System, the Board re-victimizes many Survivors. I discuss privacy in an unusual way and argue that Survivors should not be arbitrarily silenced through the use of secret hearings and publication bans on Board proceedings. It was difficult to research the Board precisely because of these legal practices. To find out what was going on at the Board, I called them and made an informal request to see some of its secret decisions. They said no, so I filed out an Access Request under Ontario's privacy legislation. I sent the required $5.00 cheque and waited. And waited. My request specified that I wanted three year's worth of denied decisions the Board had made in the last few years on applications submitted by women that pertained to any gendered violence occurrence and asked them to sever the decisions of all personally identifying information. In its decision, the Board told me that to release these decisions would be a

breach of the Survivor's privacy, no matter that I had requested it sever the files to not prevent the breach. Last summer it became apparent that if I was going to succeed at seeing any of the Board's secret decisions - I had to modify my request. I decided to forego two thirds of the decisions I wanted to see, just so that I could have a better chance at seeing any of them at all. The Board accepted my proposal in that regard but would guaranteed me nothing. They took many additional months to make its decision and last November - the decisions arrived.

I wanted the decisions because I suspected Survivors did not fare well at the Board but without them, I had no way of knowing for certain. My curiosity about the Board began in 2001 while participating at a legal feminist conference. There, some feminist lawyers who were involved in representing some Survivors making claims at the Board issued a call for research. They wanted issues surrounding victim contribution studied. My initial investigation revealed that Board adjudicators had no particular expertise on sexual assault matters but it revealed nothing about the contribution of a Survivor to her own rape because those decisions were nowhere to be found within the Board's publicly available material. As time went by, I began to wonder just how the adjudicators could make decisions on such grave matters given that many adjudicators come to the Board straight from the Criminal Justice System. I had good reason to wonder if the Board made the same mistakes that, the Criminal Justice System makes when it processes rape complaints and I knew only a handful of Survivors ever got compensation. Now that I have some of the Board's decisions, I know that Ontarians and especially women should be very concerned about this Board. In addition to how

Survivors fare at the Board, there is there a total lack of accountability and transparency there that disproportionately impacts Survivors. Board policies, procedures, its enabling legislation and its adjudicators seem to me to be problematic than the Criminal Justice System's decision-makers even though my sample of Board decisions was limited. It is not limited due to any lack of effort on my part.

For my paper, I chose to analyze 15 of the 46 decisions released to me. I chose these due to the multiplicity of problematic issues I saw within them. The Board spent 42% of its total budget in 2001-2002 on sex-related claims; a very large percentage given adjudicators have no expertise on sex-related matters. Only 7.40% of cases processed at the Board were prompted due to rapes of adult Survivors who, in 2001-2002 received collectively 8.65% of the Board's total awards. We know from looking at the epidemic of violence against women data that half of the Canadian female population reported being victims of at least one act of physical or sexual assault and we know that they did not go to the Board, nor to the Civil or Criminal Justice Systems for redress as these legal solutions do not often hear from the majority of Survivors. To make things worse, most Ontarians do not even know of the Board's existence and of the Survivors who do and have accessed it or of others who have studied it, many have complained of the process, the adjudicators' lack of expertise and sensitivity, the administrative staff, the awards, the formality of the proceedings, and of the Board's policies and procedures – especially regarding the right of the alleged rapist to attend Survivor hearings, allowing the alleged rapist to view some of the contents of Survivor file and their right to cross-examine Survivors. In addition, while in criminal law the Crown bears an onerous burden of proof

that must be met before a finding of guilt can be made, the applicants at the Board must prove that on a balance of probabilities, the crime they allege – has occurred. Applicants must show that it is more than 50% probable that they suffered a crime of violence. The difference in standards is due to the fact that the Board is part of administrative law, rather than criminal law. While decisions made by the Board are not reported or debated publicly, they are legally binding whereas decisions made under criminal law are reported and the reporting holds judges and the integrity of the judicial system at the highest level possible.

The most disturbing part of my research, notwithstanding the actual decisions the Board made on Survivor applications, was the way in which it arrived at some of its conclusions. Adjudicators made decisions on rape allegations, depending on what was decided within the Criminal Justice System - regardless of the well known problems for Survivors who go there. Adjudicators did not so much as critique a single decision made in the Criminal Justice System. Unfortunately, the problems do not end there. Because of how the Board's legislation is written, I found the problematic contribution issue that was pivotal to my undertaking of this work. Adjudicators are required by law to consider a victim's contribution to the crime, irrespective of the type of crime alleged. By requiring adjudicators to do so, they are almost invited to consider myths and stereotypes about Survivors, about rape and about the men who rape. As a result, many adjudicators denied Survivors claims because of their reliance on mythology. For example, they believed a Survivor made the allegation up because she was involved in a custody battle. At times the Board believed the Survivor had made a mistake about having been raped, though she

testified she had not consented to sexual activity. Two adjudicators even employed a criminal defence strategy to "whack" one Survivor and among other things, extracted a statement from her that relied on her own belief in mythology. At the end of the day, the decisions released to me show that adjudicators are more concerned about finding ways to deny Survivors benefits, than to find ways in which to authorize them. As well, by using myths and stereotypes to make decisions, the Board does exactly the opposite of what the Supreme Court of Canada warned all Canadian judges to stop doing.

The Board's decisions reveal a lot of confusion and contradiction. Oftentimes - decisions were so convoluted that I had to re-read them more than once to know why a Survivor had been denied an award and this is though writing proper decisions is something the Board has been warned to start doing by Appeal Court Judges who had read their decisions. Additionally, though adjudicators are supposed to use the civil standard of proof, when it comes to Survivors, they only do so in theory. Decision after decision show that decisions were made to deny awards if Survivors had not proven conclusively and without any doubt that they had been sexually assaulted. Sadly, Survivors were even denied compensation when adjudicators believed the crime may have happened.

In the last few pages of my paper, I offer a gendered reform suggestion that - if implemented - can address some of the discriminatory issues many Survivors face at the Board.

I welcome you now to a dialogue on my work.